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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 57

COURTNEY M. MABEE, CHARLES K. BARNUM,
EDWARD G. TOMPKINS, ET AL., PETITIONERS,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

PETITION FOR CERTIORARI FILED APRIL 12, 1945.

CERTIORARI GRANTED MAY 21, 1945.

SUPREME COURT OF THE UNITED STATES

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**IN SUPREME COURT OF NEW YORK, WESTCHESTER
COUNTY**

**COURTNEY M. MABEE, CHARLES K. BARNUM, TERESA FLINTOFT,
Edward R. Salter, Edward G. Tompkins, Norton Mock-
ridge, John M. Page, George S. Trow and William L.
O'Donovan, Plaintiffs,**

against

WHITE PLAINS PUBLISHING COMPANY, INC., Defendant

SUMMONS

To the Above Named Defendant:

You Are Hereby Summoned to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance on the Plaintiffs' Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated: July 20, 1942.

**Stephen R. J. Roach, Attorney for Plaintiffs, 175
Main Street, White Plains, N. Y.**

**[fol. 5] IN SUPREME COURT OF NEW YORK, WESTCHESTER
COUNTY**

[Same Title]

AMENDED COMPLAINT

For a cause of action in favor of plaintiff Courtney M. Mabee, said plaintiff alleges:

1. Plaintiffs bring this action to recover from defendant unpaid overtime compensation and an additional equal amount as liquidated damages, and counsel fees pursuant to Section 16(b) of the Fair Labor Standards Act of 1938:

2. Jurisdiction is conferred on this Court by Section 16(b) of the Act. The act has been in effect since October 24, 1938.

3. Defendant at all times herein mentioned was, and still is, a domestic corporation and at all times hereinafter mentioned was engaged in the collection of news emanating from all parts of the United States, and printing, publishing and circulating a daily newspaper known as "The Daily Reporter," its plant and place of business, at all times hereinafter mentioned, being at White Plains, Westchester County, New York.

4. That at all times hereinafter mentioned the newspaper so published by defendant was made and consisted of material much of which was shipped and sent to defendant's place of business from points outside the State of New York, said material consisting of raw material for the making of said newspaper, and advertising, news syndicated features, reports, services, etc.

[fol. 6] 5. That defendant, at all times hereinafter mentioned sent, mailed and delivered its said newspaper outside the State of New York, to various parts of the United States, and did not confine its circulation to the State of New York.

6. That the business of publication of a newspaper, in which defendant was at all times hereinafter mentioned engaged, was, at all times, and still is, of vital importance to the national welfare, in the dissemination among the people of fresh, accurate and world-wide news of current events and conditions through the instrumentality of newspapers, and thus newspapers supply a necessity and their business effects the national interest.

7. That defendant in its said business was engaged in interstate commerce and in the production of goods for interstate commerce.

8. That plaintiffs herein at all times hereinafter mentioned were engaged in interstate commerce and in the production of goods for interstate commerce, in connection with their work for defendant.

9. That the employment of each of the plaintiffs herein, at all times hereinafter mentioned, was within the scope of

said Fair Labor Standards Act of 1938, and particularly Section 7 thereof.

10. That although the burden of proof with respect to the following is on the defendant herein, each plaintiff alleges that each plaintiff was not within any of the exceptions or exemptions set forth in any portion of said Act.

[fol. 7] 11. That said newspaper at all times hereinafter mentioned was a daily newspaper and had a circulation of over three thousand.

12. That each plaintiff herein was at the times hereinafter mentioned employed by defendant in connection with the making and publication of said newspaper.

13. That none of the plaintiffs herein was employed at any of the times hereinafter mentioned, pursuant to any agreement made by defendant with any representative as a result of collective bargaining.

14. That pursuant to the provisions of said Act, which went into effect October 24, 1938, each plaintiff herein became entitled to receive from defendant overtime pay, at the rate of one and one-half times the regular rate at which such plaintiff was employed for a work week longer than forty-four hours during the first year from the effective date of said Act, for a work week longer than forty-two hours during the second year from such date, for a work week longer than forty hours after the expiration of the second year from such date, together with interest thereon.

15. That, in addition thereto, each plaintiff, pursuant to the provisions of said Act, has become entitled, to an additional sum equal to the total of said overtime pay, together with interest thereon.

16. That in addition thereto, pursuant to the provisions of said Act, each plaintiff is entitled to a reasonable attorney's fee to be paid to each plaintiff by defendant herein.

[fol. 8] 17. That the duties performed by each plaintiff herein, at the times hereinafter mentioned, were essential parts of the production, preparation, and circulation of defendant's said newspaper, and that the duties of each plaintiff constituted the production of goods for commerce within the meaning of said Act and each plaintiff was engaged in commerce within the meaning of said Act.

18. That plaintiff Courtney M. Mabee at all times therein mentioned was employed by defendant in gathering news and editing same and said plaintiff assisted defendant in the preparation and publication of said newspaper.

19. That from October, 1938 to May 15, 1940, plaintiff Courtney M. Mabee, was employed at the regular rate of \$52.50 per week.

20. That from May 15, 1940 to September 15, 1940 plaintiff Courtney M. Mabee was employed by defendant at the regular rate of \$47.50 per week.

21. That from September 15, 1940 to March 1, 1941 plaintiff Courtney M. Mabee was employed by defendant at the regular rate of \$40.00 per week.

22. That at no time during said periods did plaintiff Courtney M. Mabee receive any pay or compensation for any overtime work or any compensation above said regular salary.

23. That plaintiff Courtney M. Mabee from October 24, 1938 to October 24, 1939, worked at least nineteen hours weekly over forty-four hours weekly, and became entitled to \$33.82 per week for such overtime work.

[fol. 9] 24. That plaintiff Courtney M. Mabee from October 24, 1939 to May 15, 1940, worked at least twenty-one hours weekly over forty-two hours weekly, and plaintiff Courtney M. Mabee became entitled to \$37.38 per week for such overtime.

25. That plaintiff Courtney M. Mabee from May 15, 1940 to September 15, 1940, worked at least twenty-one hours weekly over forty-two hours weekly, and, plaintiff Courtney M. Mabee became entitled to \$35.49 per week for such overtime work.

26. That plaintiff Courtney M. Mabee from September 15, 1940 to March 1, 1941 worked at least thirty-five hours weekly over forty hours weekly and plaintiff Courtney M. Mabee became entitled to \$52.50 per week for such overtime work.

27. That, by reason of the premises, plaintiff Courtney M. Mabee became entitled to receive from defendant, for overtime pay the following sums, together with interest

thereon; for the period from October 24, 1938 to May 15, 1940, \$2,845.28, for the period from May 15, 1940 to September 15, 1940, \$567.84, for the period from September 15, 1940 to March 14, 1941, \$1,155.00; for a total of \$4,568.12, no part of which has been paid.

28. That, by reason of the premises, defendant is liable to plaintiff Courtney M. Mabee in said amount plus the interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of [fol. 10] this action, all pursuant to the provisions of said Act.

Wherefore, plaintiff Courtney M. Mabee demands judgment for the sum of \$9,136.24 plus interest thereon, plus a reasonable attorney's fee to be fixed by the Court and paid by the defendant, together with the costs and disbursements of this action.

And for a cause of action on behalf of Charles K. Barnum, said plaintiff alleges

29. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

30. That plaintiff Charles K. Barnum at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

31. That from October, 1938 to January 12, 1939, plaintiff Charles K. Barnum was employed by defendant at the regular rate of \$27.50 per week.

32. That from January 12, 1939 to October 24, 1939, plaintiff Charles K. Barnum was employed by defendant at the regular rate of \$32.50 per week.

33. That from October 24, 1939 to June 1, 1940 plaintiff Charles K. Barnum was employed by defendant at the regular rate of \$32.50 per week.

34. That at no time during said periods did plaintiff [fol. 11] Charles K. Barnum receive any pay or compensation for any overtime work, or any compensation above said regular salary.

35. That plaintiff Charles K. Barnum, from October 24, 1938 to January 12, 1939, worked at least twenty-nine hours weekly over forty-four hours weekly, and became entitled to \$27.55 per week for such overtime work.

36. That plaintiff Charles K. Barnum from January 12, 1939 to October 24, 1939 worked at least twenty-one hours weekly over forty-four hours weekly, and, plaintiff became entitled to \$23.31 per week for such overtime work.

37. That plaintiff Charles K. Barnum from October 14, 1939 to June 1, 1940 worked at least twenty-three hours weekly over forty-two hours weekly, and plaintiff became entitled to \$26.45 per week for such overtime work.

38. That by reason of the premises, plaintiff Charles K. Barnum became entitled to receive from defendant for overtime pay, the following sums, together with interest thereon; for the period from October 24, 1938 to January 12, 1939, \$303.05, for the period from January 12, 1939 to October 24, 1939, \$955.71, for the period from October 24, 1939 to June 1, 1940, \$793.50, or a total of \$2,052.26, no part of which has been paid.

39. That by reason of the premises, defendant is liable to plaintiff Charles K. Barnum in said amount plus the interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be [fol. 12] paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said Act.

Wherefore, plaintiff Charles K. Barnum demands judgment against defendant for the sum of \$4,104.52, plus interest thereon, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action. A

And for a cause of action in favor of plaintiff Teresa Flintoft, said plaintiff alleges:

40. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

41. That plaintiff Teresa Flintoft at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

42. That plaintiff Teresa Flintoft from October, 1938 to March 1, 1941 was employed by defendant at the regular rate of \$27.50 per week.

43. That at no time during said period did plaintiff Teresa Flintoft receive any pay or compensation for any overtime work, or any compensation above said regular salary.

44. That plaintiff Teresa Flintoft from October 24, 1938 to October 24, 1939 worked at least fourteen hours weekly over forty-four hours weekly, and became entitled to \$8.75 per week for such overtime work.

[fol. 13] 45. That plaintiff Teresa Flintoft from October 24, 1939 to March 1, 1940 worked at least sixteen hours weekly over forty-two hours weekly, and became entitled to \$10.48 per week for such overtime.

46. That plaintiff Teresa Flintoft from March 1, 1940 to October 24, 1940 worked at least twenty hours weekly over forty-two hours weekly and became entitled to \$13.10 per week for such overtime.

47. That plaintiff Teresa Flintoft from October 24, 1940 to March 1, 1941, worked at least twenty hours weekly over forty hours weekly and became entitled to \$13.80 per week for such overtime.

48. That, by reason of the premises, plaintiff Teresa Flintoft became entitled to receive from defendant, for overtime pay, the following sums, together with interest thereon; for the period from October 24, 1938 to October 24, 1939, \$455.00; for the period from October 24, 1939 to March 1, 1940, \$199.12; for the period from March 1, 1940 to October 24, 1940, \$301.30; for the period from October 24, 1940 to March 1, 1941, \$262.20; for a total of \$1,217.62, no part of which has been paid.

49. That, by reason of the premises, defendant is liable to plaintiff Teresa Flintoft in said amount plus the interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said act.

[fol. 14] Wherefore, plaintiff Teresa Flintoft demands judgment against defendant for the sum of \$2,435.24, plus

interest thereon, plus a reasonable attorney's fee to be fixed by the court and paid by the defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff Edward R. Salter, said plaintiff alleges:

50. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

51. That plaintiff Edward R. Salter at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

52. That from October 1938 to October 24, 1940, plaintiff Edward R. Salter was employed at the regular rate of \$37.50 per week.

53. That from December 21, 1940, to March, 1941, plaintiff Edward R. Salter was employed by defendant at the regular rate of \$30.00 per week.

54. That at no time during said periods did plaintiff Edward R. Salter receive any pay or compensation for any overtime work or any compensation above said regular salary.

55. That plaintiff Edward R. Salter from October 24, 1938 to October 24, 1939, worked at least twenty-six hours weekly over forty-four hours weekly and became entitled to \$33.28 weekly for such overtime work.

[fol. 15] 56. That Edward R. Salter from October 24, 1939 to October 24, 1940 worked at least twenty-eight hours weekly over forty-two hours weekly and became entitled to \$37.52 per week for such overtime work.

57. That plaintiff Edward R. Salter from December 21, 1940 to March 1, 1941 worked at least fourteen and one-half hours weekly over forty hours weekly and became entitled to \$16.39 per week for such overtime work.

58. That by reason of the premises, plaintiff Edward R. Salter became entitled to receive from defendant, for overtime pay the following sums, together with interest thereon: for the period from October 24, 1938 to October 24, 1939 \$1,730.86; for the period from October 24, 1939 to

October 24, 1940, \$1,951.04; for the period from December 21, 1940 to March 1, 1941, \$180.24; for a total of \$3,862.14, no part of which has been paid.

59. That by reason of the premises, defendant is liable to plaintiff Edward R. Salter in said amount plus the interest thereon and plus an additional sum equal to the total, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore plaintiff Edward R. Salter demands judgment for the sum of \$7,724.28, plus interest, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

[fol. 16] And for a cause of action in favor of plaintiff Edward G. Tompkins, said plaintiff alleges:

60. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

61. That plaintiff Edward G. Tompkins at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

62. That from October 1938 to May 15, 1940 plaintiff Edward G. Tompkins was employed at the regular rate of \$40.00 per week.

63. That from May 15, 1940 to September 15, 1940 plaintiff Edward G. Tompkins was employed at the regular rate of \$35.00 per week.

64. That from September 15, 1940 to March 1, 1941 plaintiff Edward G. Tompkins was employed at the regular rate of \$35.00 per week.

65. That at no time during said period did plaintiff Edward G. Tompkins receive any pay or compensation for any overtime work or any compensation above said regular salary.

66. That plaintiff Edward G. Tompkins from October 24, 1938 to October 24, 1939 worked at least nine hours over

forty-four hours weekly and became entitled to \$12.24 per week for such overtime work.

67. That plaintiff Edward G. Tompkins from October 24, 1939 to May 15, 1940 worked at least eleven hours over [fol. 17] forty-two hours weekly and became entitled to \$15.75 per week for such overtime work.

68. That plaintiff Edward G. Tompkins from May 15, 1940 to September 15, 1940 worked at least eleven hours over forty-two hours weekly and became entitled to \$13.75 per week, for such overtime work.

69. That plaintiff Edward G. Tompkins from September 15, 1940 to October 24, 1940 worked at least eight hours over forty-two hours weekly and became entitled to \$10.00 per week for such overtime work.

70. That plaintiff Edward G. Tompkins from October 24, 1940 to March 1, 1941 worked at least eight hours over forty hours weekly and became entitled to \$10.56 per week for such overtime work.

71. That by reason of the premises, plaintiff Edward G. Tompkins became entitled to receive from defendant, for overtime pay, the following sums, together with interest thereon: for the period from October 24, 1938 to October 24, 1939, \$636.48; for the period from October 24, 1939 to May 15, 1940 \$456.27; for the period from May 15, 1940 to September 15, 1940, \$247.50; for the period from September 15, 1940 to October 24, 1940 \$50.00; for the period from October 24, 1940 to March 1, 1941, \$200.54, for a total of \$1,590.79, no part of which has been paid.

72. That by reason of the premises, defendant is liable to plaintiff Edward G. Tompkins in said amount plus the [fol. 18] interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore plaintiff Edward G. Tompkins demands judgment from defendant for the sum of \$3,081.58, plus interest thereon, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff Norton Mockridge, said plaintiff alleges:

73. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of the complaint as though here set forth at length.

74. That plaintiff Norton Mockridge at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

75. That from October 24, 1938 to March 1, 1941 plaintiff Norton Mockridge was employed by defendant at the following regular weekly rates from October 24, 1938 to August 21, 1939 at \$40.00 per week, from September 14, 1939 to September 15, 1940 at \$45.00 per week, from September 15, 1940 to November 20, 1940 at \$40.00 per weekly.

76. That at no time during the periods herein mentioned did plaintiff Norton Mockridge receive any pay or compensation [fol. 19] for any overtime work.

77. That plaintiff Norton Mockridge from October 24, 1938 to August 21, 1939, and from September 14, 1939 to October 24, 1939, worked at least fifteen hours weekly over forty-four hours weekly, and became entitled to \$19.95 per week for such overtime work during the said period between October 24, 1938 to August 21, 1939 and said plaintiff between September 14, 1939 and October 24, 1939 worked at least fifteen hours weekly over forty-four hours weekly, and became entitled to \$23.10 per week for such overtime work during the said period between September 14, 1939 and October 24, 1939.

78. That plaintiff Norton Mockridge from October 24, 1939 to September 15, 1940 worked at least seventeen hours weekly over forty-two hours weekly, and became entitled to \$27.54 per week for such overtime work during said period and said plaintiff from September 15, 1940 to October 24, 1940 worked at least seventeen hours weekly over forty-two hours weekly, and became entitled to \$24.31 per week for such overtime work during said period between September 15, 1940 and October 24, 1940.

79. That plaintiff Norton Mockridge from October 24, 1940, to November 20, 1940 worked at least nineteen hours

weekly over forty hours weekly, and became entitled to \$28.50 per week for such overtime work.

80. That by reason of the premises, plaintiff Norton Mockridge, became entitled to receive from defendant for overtime pay, the following sums, together with interest [fol. 20] thereon: for the period from October 24, 1938 to August 21, 1939, \$857.85; for the period from September 14, 1939 to October 24, 1939, \$139.62; for the period from October 24, 1939 to September 15, 1940, \$1,294.38; for the period from September 15, 1940 to October 24, 1940; \$121.55; for the period from October 24, 1940 to November 20, 1940 \$114.00; for a total of \$2,527.43.

81. That by reason of the premises, defendant is liable to plaintiff Norton Mockridge in said amount plus the interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore, plaintiff Norton Mockridge demands judgment of defendant in the sum of \$5,054.86 plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff John M. Page, said plaintiff alleges:

82. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

83. That plaintiff John M. Page at all times herein mentioned was employed by defendant in gathering news and rewriting same for the preparation and publication of said newspaper.

[fol. 21] 84. That from October 1938 to October 24, 1939 plaintiff John M. Page was employed by defendant at the regular rate of \$25.00 per week.

85. That from October 24, 1939 to September 5, 1940 plaintiff John M. Page was employed by defendant at the regular rate of \$27.50 per week.

86. That at no time during said periods did plaintiff John M. Page receive any pay or compensation for any

overtime work, or any compensation above said regular salary.

87. That plaintiff John M. Page was not employed pursuant to any agreement made by defendant with any representative as a result of collective bargaining.

88. That plaintiff, John M. Page from October 24, 1938 to October 24, 1939, worked at least thirteen and one-half hours weekly over forty-four hours weekly and John M. Page became entitled to \$11.61 weekly for such overtime work.

89. That plaintiff, John M. Page from October 24, 1939 to September 5, 1940 worked fifteen and one-half hours weekly over forty-two hours weekly and plaintiff John M. Page became entitled to \$14.85 per week for such overtime work.

90. That by reason of the premises, plaintiff John M. Page became entitled to receive from defendant, for overtime pay the following sums, together with interest thereon: for the period from October 24, 1938 to October 24, 1939 \$603.72; for the period from October 24, 1939 to September 5, 1940, \$668.25; for a total of \$1,271.97, no part of which has been paid.

91. That by reason of the premises, defendant is liable to plaintiff John M. Page in said amount plus the interest thereon and plus an additional sum equal to the total thereof; and plus a reasonable attorney's fee to be paid by the defendant, besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore, plaintiff John M. Page demands judgment against defendant for the sum of \$2,543.94, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff George Trow, said plaintiff alleges:

92. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

93. That plaintiff George Trow at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

94. That plaintiff George Trow, was employed by defendant at the following regular weekly rates from October 24, 1938 to about February 24, 1939 at the rate of \$17.50 per week, from about February 24, 1939 to about October 24, 1939 at the rate of \$20.00 per week, from about October [fol. 23] 24, 1939 to about October 24, 1940 at the rate of \$22.50 per week, from about October 24, 1940 to March 1, 1941 at the rate of \$25.00 per week.

95. That plaintiff George Trow, from October 24, 1938 to about February 24, 1939 worked at least seventeen and one-half hours weekly over forty hours weekly and became entitled to \$10.50 weekly for such overtime.

96. That plaintiff George Trow, from about February 24, 1939 to about October 24, 1939 worked at least seventeen and one-half hours weekly over forty-four hours weekly and became entitled to \$12.08 weekly for such overtime.

97. That plaintiff George Trow, from October 24, 1939 to about October 24, 1940 worked at least nineteen and one-half hours weekly over forty-two hours weekly and became entitled to \$15.80 weekly for such overtime.

98. That plaintiff George Trow, from about October 24, 1940 to March 1, 1941, worked at least twenty-one and one-half hours weekly over forty hours weekly and became entitled to \$22.36 weekly for such overtime.

99. That at no time during the periods herein mentioned did plaintiff George Trow receive any pay or compensation for any overtime work, or any compensation above said regular salary.

100. That by reason of the premises, plaintiff George Trow became entitled to receive from defendant, for overtime pay, the following sums, together with interest thereon; for the period from October 24, 1938 to about [fol. 24] February 24, 1939, \$178.50; for the period from about February 24, 1939 to about October 24, 1939, \$422.80; for the period from about October 24, 1939 to about October 24, 1940, \$821.60; for the period from about October 24,

1940 to March 1, 1941, \$424.84; for a total of \$1,847.74, no part of which has been paid.

101. That by reason of the premises, defendant is liable to plaintiff George Trow in the said amount, plus the interest thereon and plus an additional sum equal to the total thereof; and plus a reasonable attorney's fee to be paid by the defendant, besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore plaintiff George Trow demands judgment against defendant for the sum of \$3,695.48, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff William L. O'Donovan, said plaintiff alleges:

102. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

103. That plaintiff William L. O'Donovan at all times herein mentioned was employed by plaintiff in editing news and gathering news and in furthering various activities [fol. 25] fostered by defendant for the purpose of creating news and otherwise assisting in the publication of said newspaper.

104. That plaintiff William L. O'Donovan from October 24, 1938 to January 1, 1940 was employed by defendant at the regular weekly rate of \$105.48.

105. That plaintiff William L. O'Donovan from January 1, 1940 to October 24, 1939 was employed by defendant at the regular weekly rate of \$113.46.

106. That plaintiff William L. O'Donovan from October 24, 1939 to January 1, 1940 was employed by defendant at the regular weekly rate of \$113.46.

107. That plaintiff William L. O'Donovan from January 1, 1940 to October 24, 1940 was employed by defendant at the regular weekly rate of \$98.00.

108. That plaintiff William L. O'Donovan from October 24, 1940 to January 1, 1941 was employed by defendant at the regular weekly rate of \$98.00.

109. That at no time during the periods herein mentioned did plaintiff William L. O'Donovan receive any pay or compensation for any overtime work or any compensation above said regular salary.

110. That plaintiff from October 24, 1938 to January 1, 1939 worked at least ten hours over forty-four hours weekly and became entitled to \$36.00 per week for such overtime work.

[fol. 26] 111. That plaintiff William L. O'Donovan from January 1, 1939 to October 24, 1939 worked at least ten hours over forty-four hours weekly and became entitled to \$38.70 per week for such overtime work.

112. That plaintiff William L. O'Donovan from October 24, 1939 to January 1, 1940 worked at least ten hours over forty-two hours weekly and became entitled to \$40.50 per week for such overtime work.

113. That plaintiff William L. O'Donovan from January 1, 1940 to October 24, 1940 worked at least ten hours weekly over forty-two hours weekly and became entitled to \$35.00 per week for such overtime work.

114. That plaintiff William L. O'Donovan from October 24, 1940 to January 1, 1941 worked ten hours weekly over forty hours weekly, and became entitled to \$36.80 per week for such overtime work.

115. That by reason of the premises, plaintiff William L. O'Donovan became entitled to receive from defendant, for overtime pay, the following sums, together with interest thereon; from October 24, 1938 to January 1, 1939, \$360.00; from January 1, 1939 to October 24, 1939, \$1,625.40; from October 24, 1939 to January 1, 1940, \$405.00; from January 1, 1940 to October 24, 1940, \$1,470.00; from October 24, 1940 to January 1, 1941, \$368.00, for a total of \$4,228.40; no part of which has been paid.

116. That by reason of the premises, defendant is liable to plaintiff William L. O'Donovan in said amount plus the [fol. 27] interest thereon and plus an additional sum equal to the total thereof; and plus a reasonable attorney's fee to be paid by the defendant, besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore plaintiff William L. O'Donovan demands judgment against defendant for the sum of \$8,456.80, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

Wherefore, plaintiffs demand judgment as follows:

(a) In favor of plaintiff Courtney M. Mabee for the sum of \$9,136.24, plus interest thereon, plus an additional sum to be fixed by the court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(b) In favor of plaintiff Charles K. Barnum for the sum of \$4,104.52, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(c) In favor of plaintiff Teresa Flintoft, for the sum of \$2,435.24, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

[fol. 28] (d) In favor of plaintiff Edward R. Salter, for the sum of \$7,724.28, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(e) In favor of plaintiff Edward G. Tompkins, for the sum of \$3,081.58, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(f) In favor of plaintiff Norton Mockridge, for the sum of \$5,054.86 plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(g) In favor of plaintiff John M. Page, for the sum of \$2,543.94, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and

to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(h) In favor of plaintiff George S. Trow, for the sum of \$3,695.48, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(i) In favor of plaintiff William L. O'Donovan for the sum of \$8,456.80, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's [fol. 29] fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

Stephen R. J. Roach, Attorney for Plaintiffs, 175
Main Street, White Plains, N. Y.

IN SUPREME COURT OF NEW YORK, WESTCHESTER COUNTY

[Same Title].

ANSWER

The defendant, by Marlatt & Brooks, its attorneys, answering the alleged cause of action in favor of Courtney M. Mabee set forth in plaintiffs' amended complaint herein:

1. Denies the jurisdiction of this Court as alleged in paragraph 2.

2. Denies that it has any knowledge or information sufficient to form a belief as to the allegations of paragraph 6.

3. Denies the allegations of paragraphs 4, 5, 7, 8, 9, 10, 14, 15, 16 and 17.

4. Denies the allegations of paragraphs 21, 23, 24, 25, 26, 27 and 28.

[fol. 30] The defendant answering the alleged cause of action in favor of Charles K. Barnum set forth in plaintiffs' amended complaint herein:

5. Answering paragraph 29 repeats the denials contained in paragraphs 1, 2 and 3 herein.

6. Denies the allegations of paragraphs 35, 36, 37, 38 and 39.

The defendant answering the alleged cause of action in favor of Teresa Flintoft set forth in plaintiffs' amended complaint herein:

7. Answering paragraph 40 repeats the denials contained in paragraphs 1, 2 and 3 herein.

8. Denies the allegations of paragraphs 44, 45, 46, 47, 48 and 49.

The defendant answering the alleged cause of action in favor of Edward R. Salter set forth in plaintiffs' amended complaint herein:

9. Answering paragraph 50 repeats the denials contained in paragraphs 1, 2 and 3 herein.

10. Denies the allegations of paragraphs 52, 55, 56, 57, 58 and 59.

[fol. 31] The defendant answering the alleged cause of action in favor of Edward G. Tompkins set forth in plaintiffs' amended complaint herein:

11. Answering paragraph 60 repeats the denials contained in paragraphs 1, 2 and 3 herein.

12. Denies the allegations of paragraphs 62, 63, 64, 66, 67, 68, 69, 70, 71 and 72.

The defendant answering the alleged cause of action in favor of Norton Mockridge set forth in plaintiffs' amended complaint herein:

13. Answering paragraph 73 repeats the denials contained in paragraphs 1, 2 and 3 herein.

14. Denies the allegations of paragraphs 75, 77, 78, 79, 80 and 81.

The defendant answering the alleged cause of action in favor of John M. Page set forth in plaintiffs' amended complaint herein:

15. Answering paragraph 82 repeats the denials contained in paragraphs 1, 2 and 3 herein.

16. Denies the allegations of paragraphs 84, 85, 88, 89, 90 and 91.

[fol. 32] The defendant answering the alleged cause of action in favor of George S. Trow set forth in plaintiffs' amended complaint herein:

17. Answering paragraph 92 repeats the denials contained in paragraphs 1, 2 and 3 herein.

18. Denies the allegations of paragraphs 94, 95, 96, 97, 98, 100 and 101.

The defendant answering the alleged cause of action in favor of William L. O'Donovan set forth in plaintiffs' amended complaint herein:

19. Answering paragraph 102 repeats the denials contained in paragraphs 1, 2 and 3 herein.

20. Denies the allegations of paragraphs 104, 105, 106, 107, 108, 110, 111, 112, 113, 114, 115 and 116.

The defendant further answering each and every alleged cause of action in the plaintiffs' amended complaint herein and as a first separate defense thereto alleges:

21. That this Court has no jurisdiction over the subject-matter of the causes of action for the reasons that:

(a) The Fair Labor Standards Act under which the claims against defendant set forth in the complaint are alleged to have arisen is not a statute which can be applied to the business of defendant by reason of the commerce [fol. 33] clause (Article I, Section 8) of the Constitution of the United States.

(b) The aforesaid Act, if applied to the defendant, would violate its rights as guaranteed by the First Amendment to the Constitution of the United States.

(c) The aforesaid Act, if applied to the defendant, would violate its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

The defendant further answering each and every alleged cause of action in the plaintiffs' amended complaint herein and as a second separate defense thereto alleges:

22. That the Fair Labor Standards Act is unconstitutional in-so-far-as it applies to daily newspapers in that it violates

the rights guaranteed by the First and Fifth Amendments to the Constitution of the United States and Article I, Section 8 of the Constitution of the United States, and more particularly because it attempts to classify newspapers on the basis of volume of circulation, frequency of issue and area of distribution in such a manner as to exempt thousands of newspapers from the burdens of the Act while subjecting all others engaged in the same business to those burdens.

[fol. 34] The defendant further answering each and every alleged cause of action in the plaintiffs' amended complaint herein and as a third separate defense alleges:

23. That each of the plaintiffs Courtney M. Mabec, Charles K. Barnum, Teresa Flintoft, Edward R. Salter, Edward G. Tompkins, Norton Mockridge, John M. Page, George S. Trow, William L. O'Donovan were at all times named in the complaint employed in a bona fide professional capacity and therefore exempt from the application of the provisions of Sections 6 and 7 of the Act herein by reason of the provisions of Section 13(a) (1) thereof; that plaintiff O'Donovan was at all times named in the complaint employed in a bona fide executive capacity and therefore exempt from the application of the provisions of Sections 6 and 7 of this Act herein by reason of the provisions of Section 13 (a) (1) thereof.

24. That the plaintiffs Courtney M. Mabec, Charles K. Barnum, Edward R. Salter, Edward G. Tompkins, Norton Mockridge, John M. Page, George S. Trow were at all times named in the complaint employed by the defendant in the gathering and writing of news reports; that such work is essentially professional in character.

25. That the plaintiff O'Donovan was at all times named in the complaint employed by the defendant as City Editor; that such work is both executive and professional in character.

26. That the plaintiff Flintoft was at all times named in [fol. 35] the complaint employed by the defendant as Society Editor; that such work is essentially professional in character.

The defendant further answering each and every alleged cause of action in the plaintiffs' amended complaint herein and as a fourth separate defense alleges:

27. That the business of the defendant in common with all newspapers is the rendering of a service to its readers through the dissemination of information in the printed form; that the provisions of Sections 6 and 7 of the Act herein do not apply to any of the plaintiffs herein since they were at all times named in the complaint employees engaged in a service establishment the greater part of whose servicing was at all times in intrastate commerce within the provisions of Section 13 (a) (2) of the Act herein.

Wherefore, the defendant demands judgment against the plaintiffs and each of them dismissing the amended complaint together with the costs of this action.

Marlatt & Brooks, Attorneys for Defendant, Office &
P. O. Address, 11 West Prospect Avenue, Mount
Vernon, New York.

(Verified by William L. Fanning, December 9, 1942.)

[fol. 36] IN SUPREME COURT OF NEW YORK, WESTCHESTER
COUNTY

[Same Title]

ORDER FOR JUDGMENT—May 26, 1943

This action having regularly come on for trial at Trial Term, Part II of this Court, and same having been duly tried by the Court, Honorable Alonzo G. Hinkley presiding, and the proofs of the parties having been heard and the Court having found in favor of the plaintiffs, on the opinion and decision of the Court dated April 27, 1943, and sufficient reason appearing therefor, it is

Ordered that plaintiff, Courtney M. Mabee, have judgment against the defendant, White Plains Publishing Company, Inc., for the sum of \$5,264.97, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938; that

Plaintiff, Charles K. Barnum, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$958.63, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages; that

Plaintiff, Edward G. Tompkins, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$1,363.85, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also additional equal amount as liquidated damages; that

Plaintiff, Norton Mockridge, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$2,928.83, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages; that

Plaintiff, George S. Trow, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$1,544.26, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages; that

Plaintiff, William L. O'Donovan, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$4,858.79, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages; and it is further

Ordered that all the plaintiffs above named have judgment against defendant for the sum of \$1,000.00 hereby fixed by the Court as a reasonable attorney's fee to be paid to plaintiffs by defendant pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, plus the taxable costs and disbursements of this action.

The clerk of this Court is hereby directed to enter judgment accordingly.

May 26, 1943.

Enter,

Alonzo G. Hinkley, Justice of the Supreme Court.

[fol. 38] IN SUPREME COURT OF NEW YORK, WESTCHESTER
COUNTY

[Same Title]

JUDGMENT—June 2, 1943

This action having regularly come on for trial at Trial Term, Part II of this Court, and same having been duly tried by the Court, Honorable Alonzo G. Hinkley presiding, and the proofs of the parties having been heard and the Court having found in favor of the plaintiffs, on the opinion and decision of the Court dated April 27, 1943, and on the order of Mr. Justice Hinkley, dated May 26, 1943, directing the entry of judgment, and sufficient reason appearing therefor, it is

Adjudged, that plaintiff Courtney M. Mabee, recover from defendant, White Plains Publishing Company, Inc., the total sum of twelve thousand six hundred thirty-six dollars forty-eight cents (\$12,636.48) which total sum is made up as follows; \$5,264.97, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$1,014.42, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$6,279.39 from the date of said decision, viz, April 27, 1943, to the date of entry of this judgment, which interest amounts to \$38.85, and also an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that plaintiff Charles K. Barnum recover from [fol. 39] defendant, White Plains Publishing Company, Inc., the total sum of two thousand three hundred seventy-one dollars and four cents (\$2,371.04) which total sum is made up as follows: \$958.63, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$219.60, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$1,178.23 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$7.29, and also an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, and it is

Adjudged that plaintiff Edward G. Tompkins recover from defendant, White Plains Publishing Company, Inc., the

total sum of three thousand two hundred fifty-seven dollars and seventy-four cents (\$3,257.74) which total sum is made up as follows; \$1,363.85, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$255.01, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$1,618.86 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$9.99, and also an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that plaintiff Norton Mockridge recover from defendant, White Plains Publishing Company, Inc., the total sum of seven thousand one hundred seventy-three [fol. 40] dollars and seventy-four cents (\$7,173.74) which total sum is made up as follows: \$2,928.83, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$636.08, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$3,564.91 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$21.96, and also an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that plaintiff George S. Trow recover from defendant, White Plains Publishing Company, Inc., the total sum of three thousand seven hundred nine dollars and ninety-two cents (\$3,709.92) which total sum is made up as follows; \$1,544.26, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$299.32, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$1,843.58 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$11.38, and also an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that plaintiff William L. O'Donovan recover from defendant, White Plains Publishing Company, Inc., the total sum of eleven thousand eight hundred thirty-four dollars and seventy-two cents (\$11,834.72) which total [fol. 41] sum is made up as follows, \$4,858.79, plus interest thereon pursuant to Section 480 of the Civil Practice Act to

the date of said decision, viz., April 27, 1943, which interest amounts to \$1,022.30, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$5,881.09 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$38.27, and also an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that all plaintiffs, viz., Courtney M. Mabee, residing at 86 Grove Street, Stamford, Connecticut, Charles K. Barnum, residing at 43 Weskora Ave., Pleasantville, N. Y., Edward G. Tompkins, residing at Saxon Gardens Apartments, White Plains, New York, Norton Mockridge, residing at Camp Upton, New York, George S. Trow, residing at 704 Steamboat Road, Stamford, Connecticut, and William L. O'Donovan, residing at 99 Harvard Drive, Hartsdale, New York, recover from the defendant, White Plains Publishing Company, Inc., residing at 76 Grand Street, White Plains, New York, the sum of \$1,126.70 made up as follows; one thousand dollars (\$1,000.00) fixed by the Court as a reasonable attorney's fee to be paid to plaintiffs by defendant pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and \$126.70, the costs and disbursements of this action.

Dated: June 2, 1943.

Harold Mercer, Clerk.

[fol. 42] IN SUPREME COURT OF NEW YORK, COUNTY OF
WESTCHESTER

Trial Term, Part V

COURTNEY M. MABEE, CHARLES K. BARNUM, TERESA FLIN-
TOFT, Edward R. Salter, Edward G. Tompkins, Norton
Mockridge, John M. Page, George S. Trow and William
L. O'Donovan, Plaintiffs,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC., Defendant

Case

White Plains, N. Y.,
February 15, 1943; 12:40 P. M.

Before Hon. Alonzo G. Hinkley, Judge

APPEARANCES:

Stephen R. J. Roach, Esq., 175 Main Street, White Plains,
N. Y., Attorney for Plaintiffs.

Marlatt & Brooks, 11 W. Prospect Avenue, Mount Ver-
non, N. Y., Attorneys for Defendant; by Elisha Hanson,
Esq., 729 15th Street, N. W., Washington, D. C., and Miss
[fols. 43-45] Frances K. Marlatt, 11 W. Prospect Avenue,
Mount Vernon, N. Y., of Counsel.

(Mr. Roach opened the case to the Court on behalf of
the plaintiffs.)

COURTNEY M. MABEE, one of the plaintiffs, having been
first duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Mr. Mabee, you are one of the plaintiffs in this law-
suit?

A. I am.

Q. And you were formerly employed by the defendant,
the White Plains Publishing Company, Incorporated?

A. I was.

Q. And that company published a newspaper known as the Daily Reporter in the City of White Plains; is that correct?

A. It is.

Q. And it gave up the publication of the paper on March 1, 1941?

A. The last issue was February 28, 1941.

Q. At that time were you in the employ of the publishing company?

A. I was.

Q. How long had you been in the employ of the defendant publishing company up to the time of February 28, 1941?

A. I had been employed on a salary for 14 years.

Q. Were you employed continually by the company between October 24, 1938, and March 1, 1941?

A. I was.

Q. On October 24, 1938, that is the date the Act that we are concerned with became effective, what was your salary?

A. \$52.50 per week.

Q. Were you paid weekly?

A. Paid weekly.

[fol. 46] Q. This teletype machine was a machine that brought in news from some press service?

A. That is right. We had two at different periods.

Q. What time of the morning did that machine start up?

A. The machine started, I believe, at 6 o'clock. I cannot answer definitely because I was not there till 8.

Q. Is that the time it was supposed to start?

A. It was supposed to start at 6.

Q. How many persons did you have employed in the news room?

A. The number varied, but for the greater part of the time the number was nine.

Q. You say that during the afternoon you prepared copy for the next day's edition?

A. For the next day and for succeeding days.

Q. Yes. In your composing room how many shifts did you have?

A. They had two. They had two, a day side and a night side.

Q. What was that?

A. A day side and a night side.

Q. With respect to your news room, how many shifts did you have?

A. One, with the one exception of a sports man who worked for a period at night.

Q. With that one exception you only had the day shift in the news room, then?

A. That is right.

Q. And you had men in the composing room during the night?

A. That is right.

Q. Do you remember how many?

A. I believe—

[fol. 47] Mr. Hanson: I object to that as it is not even a part of the case, your Honor.

The Court: I do not know how that would be material from what little I understand.

Q. The idea I was driving at is this: In the afternoon you had to get together certain copy for the composing room and the composing room had men working at night. Is that the fact?

A. That is right.

Q. What time did the day shift of the composing room start?

A. They started, I believe, at 7 in the morning.

Mr. Hanson: I still object, if your Honor please, to anything except what this man here himself did.

He makes a claim for overtime, and the sole question, in so far as he is concerned on his time, is what hours he put in.

The Court: Objection overruled. I think I will take that. It may have some material bearing upon this theory which he has. There is no jury here.

Q. You say the day shift of the composing room started at 7 o'clock A. M.?

A. At 7 A. M.

Q. And your day's work started at what time?

A. At 8.

Q. And the material that the composing room men used was the material that you had gotten together on the previous afternoon; is that the idea?

A. That is right.

Q. During that period, from October 24, 1938, until March 1, 1941, did the Daily Reporter print national and international news?

A. Yes, it did.

[fol. 48] Q. And that news was received from what sources?

A. It came in from various sources. Some of it from the mail. Some of it came over the Associated Press wires; some over the International News Service wires.

Q. And when you say over the International News Service wires, is that connected up with that ticker which you mentioned?

A. Yes.

Q. Teletype?

A. Yes.

Q. Is that what you call it?

A. Yes.

Q. During that period did the Daily Reporter have national advertising in its newspaper?

A. It did.

Q. All during that period?

A. All during that period.

Q. And the paper that was used in making up the paper itself, that came from where?

A. It came from Maine.

Q. And the advertising mats that were used by the paper, those came from where?

A. Largely from Meyer-Both in Chicago.

The Court: What do you call it?

The Witness: Meyer-Both.

The Court: What are you asking about?

Mr. Roach: The advertising mats, your Honor.

Q. There were cuts that were used to reproduce pictures?

A. That is right.

Q. They came from where?

A. Many of them from Basil Smith Company, Philadelphia.

Q. Pennsylvania?

A. Pennsylvania, yes, sir.

Q. Between those dates, namely, October 24, 1938, and October—and March 1, 1941, did the Daily Reporter have circulation outside of the State of New York?

A. It did.

[fol. 49] Q. And during all of that period?

A. During all of that period.

Q. Did the Reporter during all that period have service with respect to features of one kind or another?

A. It did.

Q. What type of features?

A. Comic strips. We had a syndicated news, medical news column, and other cartoons—not cartoons, but panels; and I think that covered the range of the features.

Q. Where did these services come from?

A. Some came from Chicago. Many—some came from as far away as California.

Q. Did you have a pictorial service?

A. We had.

Q. During that period?

A. We did.

Q. That pictorial service came from where?

A. It came from Chicago, Central Press Association.

Q. What did you say your salary was in October of 1938?

A. \$52.50 per week.

Q. How long did that salary of \$52.50 a week remain?

A. Until May 8, 1940.

Q. So that for the period of the first year after the Act of 1938, namely, between October 24, 1938, and October 24, 1939, your salary was the same, \$52.50 per week?

A. That is correct.

Q. Now, in addition to the hours you have already testified to, Mr. Mabec, did you, during that period, namely, between October 24, 1938, and October 24, 1939, put in extra time in connection with your duties and work with the Daily Reporter?

A. Yes, I did.

Q. Did you have any Sunday work?

A. Yes, I did.

Q. What was the nature of the Sunday work you had?

[fols. 50-62] A. The Sunday work was the preparing of copy to be used in the Monday paper. That meant the complete roundup of news for Saturday and Saturday afternoon and Saturday night and Sunday had to be prepared on Sunday so that the linotype machines in the composing room would have it in at 7 o'clock Monday morning.

[fol. 63] Cross-examination.

By Mr. Hanson:

Q. Mr. Mabee, you did not have a direct wire from the Associated Press in your office at any time, did you?

A. No. We had a tie-up wire with the County News Bureau.

Q. The County News Bureau is entirely local here in Westchester County, is it not?

A. As far as I know.

Q. Yes. So far as anything that came to you from the Associated Press, it was relayed to you through the wires of the County News Bureau?

A. That I cannot answer for.

Q. Did you handle the mail room circulation of this newspaper?

A. No.

Q. Did you know of your own knowledge when you were testifying, anything about the circulation of the newspaper outside of the State of New York?

A. Yes, I did.

Q. Where did you get that information?

A. From the mailing list.

Q. Where did you get the mailing list?

A. They were at the office at all times.

Q. And when did you look over those mailing lists to determine that?

A. I have looked at them many times.

Q. About how many subscriptions did the White Plains Reporter have in 1938, if you recall?

[fol. 64] Mr. Roach: For the purpose of the record, your Honor, I object to that on the ground that the decisions seem to be harmonious and also the interpretative bulletins seem to be harmonious to the point that the amount of out-of-state circulation is not material. It is the fact of the out-of-state circulation that controls.

The Court: Objection overruled. I will take it.

Q. Do you recall what the circulation of the White Plains Reporter was during the year 1938?

A. During the year 1938?

Q. Yes.

A. The circulation of the White Plains Reporter?

Q. Yes.

A. According to their own figures?

Q. Yes.

A. I cannot guarantee the accuracy of those figures, but according to their own figures in that year, there were 11,000.

Q. Where did you get those figures?

A. What is that?

Q. Where did you get that information?

A. From Mr. Hogan and Mr. Tuller who told us that.

Q. Do you know how much of that went out of the State of New York, if any?

A. I know that some of it went out of the State of New York.

Q. How much?

A. The amount, as I understand it from their records, showed 45 copies.

Q. Out of about 11,000?

A. That is right.

Q. Going out of the State of New York?

A. Yes.

Q. For 1939, would you say the same—give me the information for 1939, the circulation and the number that went out of New York.

A. I am going again by entirely what they said. I [fol. 65] have no means of checking the actual number of copies.

Q. You did not mean then that anything went out of the State of New York?

A. Oh, yes, I do, very definitely.

Q. How do you know?

A. Because friends of mine from as far away as India received copies.

Q. How do you know that?

A. Because they told me.

Q. It is pure hearsay then?

A. No.

Q. You did not mail them to your friends in India, did you?

A. On several occasions, as a matter of fact, I did.

Q. But they did not subscribe to them through you?

A. No, they did not.

Q. You were sending them something; isn't that correct?

A. That is true.

Q. All right. In 1939, from the best of your information, what do you know the circulation to have been?

A. The total circulation of the paper?

Q. Yes.

A. According, again, I was told by Mr. Hogan and Mr. Tuller the circulation at that time was 9,500.

Q. What was the occasion of their telling you that?

A. They told us that to go out and spread the word among the advertisers in the City of White Plains and throughout Westchester County, because of the fact there was an opposition newspaper about to start or had already started.

Q. Do you recall how many of those papers in 1939 went outside of the State of New York?

A. I think the number was practically the same.

Q. That is about 45?

A. About 45.

Q. Out of 9,500?

A. That is right.

[fols. 66-69] Q. What do you know for 1940?

A. The same situation prevailed.

Q. And up until the time of the suspension on February 28, 1941?

A. That is right.

Q. So you would say they had about 9,000 through 1940, and at the date of the suspension about 45 copies going outside of the state?

A. I would say that is what I was told by executives of the corporation.

Q. You also mentioned advertising? Did you sell advertising?

A. I did.

Q. In the newspaper?

A. I did.

Q. You did?

A. I did.

Q. To whom did you sell it?

A. I sold advertising to August Huszar of the Log Cabin, Armonk; to Paul Stapelfeld of the Bavarian Gardens in Scarsdale; to William Reiber at Rhineland Gardens, Armonk; Ed Van Buskirk at Moreland Farm in Mt. Kisco. I sold it also to the Crow's Nest Restaurant in Greenwich, Connecticut, and to Leighton's Half-Way House in Greenwich, Connecticut, and to the Palisades Amusement Park in New Jersey.

I think that will cover it.

Q. And all through this period was that?

A. At various times during that period.

Q. About how much of that time did you devote to selling advertising?

A. My time devoted to selling advertising was separate from anything I did for the News Department and from anything I made a claim for.

Q. Even so, you are offering exhibits here to show the time you put in at work. Do these exhibits contain the time you spent selling advertising?

A. They do not.

Q. They do not?

A. No.

[fol. 70] Q. Is it not?

A. That is true.

Q. Yes. Now, then, you stated that you know that this newspaper company, the defendant herein, bought its newsprint from Maine. How did you know that?

A. From two executives of the corporation, Mr. Keefe, who was our business manager; Mr. Tuller, who was the publisher of the paper.

Q. How did you happen to get that information from them? Did you go in and ask them?

A. I asked Mr. Tuller. Mr. Keefe volunteered the information.

Q. In anticipation of this suit?

A. Oh, Lord, no. This was long, long before this suit was ever thought of.

Q. What was the occasion of asking where the newsprint paper came from?

A. I believe I asked them because somebody else asked me.

Q. Just curiosity?

A. They wanted to find out where it was coming in so that they could bid on it.

Q. How did you happen to know that advertising mats came in from Meyer-Both?

A. Because they came in big envelopes and very often were delivered to the newsroom rather than the Advertising Department.

Q. What is a mat? Will you explain just exactly what it is?

A. Yes. A mat is a piece of asbestos on which an impression of type has been made.

Q. Now, that mat cannot be used directly in the production of a newspaper without going through a further process; can it?

A. That is right.

Q. In the office?

A. That is right.

Q. Will you describe that process?

[fol. 71] A. That process consists of taking the mat, heating it, filling in the back of it with backing so that there will be no high spots showing on the finished product; making a metal cast of that mat, and in our particular instance we had to make a second mat. Then a cylindrical press which is put on the press and does the actual printing.

Q. In other words, you first take a flat mat that shows the page form?

A. That is right.

Q. And you make another cast of that which is a cylindrical cast, as you described?

A. Right.

Q. That goes on the press?

A. That is right.

Q. Then your paper is already on the press, is it not?

A. Yes.

Q. And your ink is there and when you start it going, why, there is the impression of the cylinder on the paper that transposes the ink thereon and brings out your printing.

A. Does the actual printing, yes.

Q. So that there are several steps between the receipt of the Meyer-Both mat and the production of the newspaper which uses it?

A. That is true.

Q. Wouldn't you say the same thing was true of the features which came in to the newspaper from outside of New York State in mat form?

A. If they came in mat form.

Q. All right. Let us assume they do not come in mat form. What happens to them? Let us say they come in, for instance, printed.

A. If they come in printed from other companies, they are handled the same as any other copy that is brought in to the newspaper.

Q. Just as news copy?

[fol. 72] A. That could be through the city desk and the additions, if any, subtractions, if any, corrections, if any, changes in punctuation, corrections in punctuation are made at the city desk, and the copy is then turned over to the composing room where it is placed on the Linotype machine, and the operator on the Linotype machine, through a mechanical device at his command, sets a line of type corresponding to the type on the copy before him. That line of type is placed in a chase.

Q. In a what?

A. You better make it a form, and the lines of type are placed around the existing advertising for that page or the space allotted for the advertising for the page.

The form is then locked up by having the chase tightened to hold the type in its place; and from that form a mat is rolled by a hydraulic rolling machine which makes an impression on that page upon the asbestos mat. This asbestos mat is taken to the pressroom where it is heated and shaped into a cylinder. The metal casting was made of that cylinder. This metal casting was placed upon the press and did the actual printing.

Q. All right. Now, then, if you get pictures they came, they usually came in mat form, did they not?

A. Oh, no, no.

Q. Did you make your own reproduction of those photographs?

A. We made some.

Q. Yes.

A. The majority of them were made by Basil-Smith in Philadelphia.

Q. Those Basil-Smith pictures which you saw when they came in, they had to go through the same process of having a mat made from them, did they not?

A. That is true.

[fol. 73] Q. Being placed on a form and then having your cylinder made and a cylinder cast to go on the press?

A. Yes, that is true.

Q. Do you know of anything that came in that office that went out in just exactly the form that it came in

without going through this process of editing, of correction, of shortening or something in the composing room, the teletyping room or the pressroom?

A. Well, on stereotyped newspaper it has to be changed.

Q. What is that?

A. I said on a stereotyped newspaper you must make changes.

Q. What kind of newspaper is that? Is that what kind of newspaper you had?

A. That is true. It is mechanically impossible to do it otherwise.

Q. In your News Department you were speaking of taking those reports off the ticker?

A. That is right.

Q. Did you use all of the information that came in on the ticker?

A. No, we did not.

Q. Was it not a fact, Mr. Mabey, that your paper used very little of that information between 1938 and 1939?

A. During 1938 and 1939 we used as much as we did later.

Q. Your paper largely concentrated on the local news?

A. That is true.

Q. In White Plains?

A. That is quite true.

Q. But whether the material came in from the County News Service or by the INS wire or from your own reporters, it went over the copy desk?

A. That is right.

Q. Then this man on the copy desk, either of his own volition or by instruction of someone or other, selected that material and edited it to suit the purposes of the paper?

A. That is right.

[fols. 74-106] Q. And in many cases he discarded most of what came over his desk, did he not?

A. I won't say in many cases.

Q. Well, take your Associated Press dispatches. Most of those went into the waste basket?

A. Yes. I grant you that the majority of them did.

Q. Take the International News Service.

A. Not as much on International News Service as on Associated Press.

Q. Not as much as that?

A. No.

Q. How about the County News Service?

A. The County News Service was used to a great extent.

Q. That was used to a great extent?

A. That is true.

Q. All right. But then after that was edited on the desk and in the process of editing you wrote heads for it?

A. That is right.

Q. For that material?

A. Yes.

Q. And you wrote subheads?

A. Yes.

Q. After that it had to go to the composing room, did it not?

A. That is true.

Q. When it got to the composing room it was first set in type?

A. True.

Q. Then put in the page form?

A. True.

Q. Then it went in to have a mat made of that form?

A. That is true.

Q. And then had another mat made?

A. No.

Q. What happened then?

A. One mat was made from your form.

Q. One mat from your form?

A. Yes.

Q. And then a cylinder?

A. And a cylinder cast.

Q. And then you made your cylinder from the mat and then put the mat on and started to go to work?

A. That is true.

[fol. 107] NORTON MOCKRIDGE, one of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Private Mockridge, you are stationed at Camp Upton?

A. That is right.

Q. With the United States Army?

A. That is right.

Q. In what department?

A. The Military Intelligence and Internal Security Section.

Q. And in October, 1938, were you in the employ of the defendant, the White Plains Publishing Company?

A. I was.

Q. Publisher of the White Plains Daily Reporter?

A. I was.

Q. And how long did you continue in that employ of that company?

A. Until November 12, 1940.

Q. How long had you been with the Daily Reporter at the time you became disassociated with it?

[fols. 108-141] A. Since the early part of 1936. I think it was February.

Q. 1936?

A. Yes.

Q. Now, in October, 1938, what were your duties?

A. In October of 1938?

Q. Yes.

A. I was a reporter on this newspaper. In addition to general news assignments, general reporting, general rewrite, I handled theatricals, amusements, and I would say that I worked on special features.

I handled various promotions that the paper itself had. Do you want me to go specifically into going out and covering meetings of general sorts?

Q. No. I just want a general outline.

A. General promotion, general reporting and general theatricals.

Q. What time did you start your work in the morning?

A. 8 o'clock.

Q. And you worked until how late?

A. 6 o'clock at night.

Q. That was Monday through Friday?

A. Monday through Friday, and on Saturdays from 8 until 1:00 A. M.—1:00 P. M.; pardon me.

Q. And Monday through Friday did you take time out for lunch?

A. I took at least half an hour, and I had as much as an hour.

Q. Did you ever take over an hour for lunch?

A. Never more than an hour.

Q. Anywheres from a half an hour to an hour?

A. Yes, and in my case where we were rather rushed I did not go out for lunch at all. I had lunch brought in.

Q. With respect to the period from October 24, 1938, until January 1, 1939, did you do any work beyond the hours which you have just mentioned?

A. Yes, I did.

[fol. 142] Recross-examination by Mr. Hanson:

Q. Just why would it be impossible, Mr. Mockridge, to give accurate hours spent at those meetings?

A. Because I have never punched a time clock.

Q. You have never punched a time clock?

A. I never watched the clock.

Q. In other words, you never kept any record of the time you put in while you were employed, did you?

A. No.

Q. You never made any claim for overtime, did you?

A. I did not know I could.

Q. The answer is "No," isn't it?

A. No.

Q. And you never made any claim for overtime until you filed this suit, did you?

A. Yes.

Q. When?

A. I went to the Wage and Hours people soon after I was fired, and spoke to them about it. They suggested I start suit then.

Q. I still ask you did you ever make any claim on your employer directly?

A. No.

Q. At any time until you filed this suit?

A. For what?

Q. For overtime.

A. No. I asked for more money.

Q. Well, I mean for overtime under this Act, if it applies to this employer.

A. No.

Q. To this defendant?

A. No, not for overtime as such.

Q. In your bill of complaint here how do you reach the estimate of overtime which you allege in there?

A. I estimated the minimum number of hours I worked on these assignments, and turned them over to Mr. Roach and he computed it.

Q. Did you ever check what you allege in that complaint [fols. 143-160] as to the minimum number of hours overtime week by week?

A. I do not recall exactly what it is.

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[fol. 161] CHARLES K. BARNUM, one of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Mr. Barnum, where do you reside?

A. At 43 West Cora Avenue, Pleasantville, New York.

Q. In October, 1938, were you in the employ of the White Plains Publishing Company, Incorporated, publisher of the White Plains Daily Reporter?

A. Yes.

[fol. 162] Q. Had you been in its employ prior to that time, and if so, for how long?

A. I believe since July, 1937.

Q. In October of 1938 what were your duties, generally speaking?

A. Pardon me. What was that?

Q. What were your duties, generally speaking, in October of 1938?

A. That of assistant sports editor, which required assisting the editor in all the duties of the sports desk of the paper.

Q. What time of the day did you start your work?

A. Before 7 o'clock in the morning.

Q. You were there before some of the other newsmen?

A. Yes.

Q. Was there some reason why you, assistant sports man, got there before the other newsmen?

A. Yes. The reason was that the sports pages were cleared out earlier than the rest of the newspaper.

Q. When you got there in the morning was it you who started the ticker that we have heard about before in this lawsuit?

A. Yes.

Q. What type of news generally came over the teletype first?

A. Generally it was sports news and early general news. The news was alternated on the ticker.

Q. Until the other newsmen got there did you handle the teletype machine?

A. I handled it to the extent of taking the copy off the machine, and taking from that copy what I needed.

Q. How late would you work in the day, that is, your regular day?

A. Until after 4 o'clock in the afternoon.

Q. Did you have some time off for lunch?

A. I generally took half an hour.

[fols. 163-212] Q. Did you on occasions work beyond 4:00 P. M. in the afternoon?

A. Frequently.

Q. What about Saturdays?

A. I worked Saturdays. May I refer to the memo I made?

Mr. Hanson: Wait a minute. What is the memorandum you are reading from?

The Witness: I noted down the hours that I spent in the office, because when I changed my position with the paper later those hours changed, and I wanted to be sure not to make any mistakes or get any confusion.

Q. When did you do that, Mr. Barnum, if I may ask?

A. Prepare this?

Mr. Hanson: Yes.

The Witness: Several days ago. Sometime last week.

Mr. Hanson: Does it come from any records that you had prepared previously or just out of your head?

The Witness: I verified it with information I had given Mr. Roach.

Mr. Hanson: Well now, wait a minute. I am asking you the question whether it came from any records that you had previously prepared or something else. Where did you get the information on which you based that?

The Witness: This is my recollection.

Mr. Hanson: That is from your recollection?

The Witness: Yes.

Mr. Hanson: What is the information you previously gave Mr. Roach with which you verified this?

The Witness: That was information I prepared too from my recollection.

[fol. 213] Recross-examination.

By Mr. Hanson:

Q. When you went through these books, getting back to them again, you did not check the number of dates on which your page appeared, did you?

A. No.

Q. Now, at these wrestling matches and boxing matches, was your story about the crowd or was your story about the match that took place, if you did the writing?

A. Generally it was about the match and sometimes on the crowd.

Q. All of your work was done, was it not, Mr. Barnum, to convey information about events that took place in White Plains or in Westchester County to the people who were readers of the White Plains Reporter; is that correct?

A. Well, yes. I think occasionally my work may have spread further down than that.

Q. In what way?

A. I believe that occasionally it was outside of Westchester County.

Q. That you moved outside of Westchester County?

A. In the coverage of an event.

Q. All right, but for the people of Westchester County?

A. For the people of Westchester County.

[fol. 214] EDWARD G. TOMPKINS, one of the plaintiffs, having been duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Where do you reside, Mr. Tompkins?

A. 23 Mamaroneck Road, White Plains.

Q. In October of 1938, were you in the employ of the defendant, the White Plains Publishing Company?

A. I was.

Q. Were you still in the employ of the publishing company when it gave up publishing its newspaper on February 28, 1941?

A. I was.

Q. How long had you been in the employ of the Daily Reporter up until the time that it gave up its publishing?

A. It was a little over 12 years.

Q. On October 24, 1938, you were employed by the Daily Reporter in what capacity?

A. I was staff man, assigned to covering Scarsdale, Greenburgh and Elmsford.

Q. What time did you start your work?

A. 8 o'clock in the morning.

Q. And you worked during the day until what time?

A. 5 o'clock, sometimes later.

Q. During that period did you take out time for lunch, and if so, how much time?

A. Yes, I did.

Q. How much?

A. Less than an hour.

Q. On Saturdays, what time did you work in the office?

A. From 8:00 A. M. to 1:00 P. M.

Q. Did you take any time out for lunch during that period?

A. No, sir.

[fols. 215-250] Q. Now, in addition to those hours, did you have any night assignments and night work in the office?

A. Yes.

Q. Did you on occasions work at the office after 5 o'clock at night from Monday to Friday, inclusive?

A. Yes.

Q. And until what time and how many nights a week?

A. Well, it would be at least two nights a week and at least up to 6 o'clock.

Q. So from Monday to Friday—

The Court: What was that last answer?

(Answer read by the reporter.)

Q. So from Monday to Friday, inclusive, you worked from 8:00 A. M. to 5:00 P. M. with not more than an hour out for lunch and on two of those dates you worked—instead of working until 5 you worked till 6; is that correct?

A. Yes, that is right. At least two of those days. It might have been more.

Q. How many night assignments would you have?

A. At least three nights a week.

Q. And the at least three nights a week period would be what, from October 24, 1938, until when?

A. Until the early part of March.

Q. Of 1939?

A. Of 1939.

Q. Do you have a definite date as to the early part of March? Do you have any memorandum there that establishes the date more specifically?

A. I do not have a definite date, no, sir. I know that I started covering the courthouse in the last part of February, but during the first—the last part of February and possibly one or two days in March I was assisting in breaking in a new man to take over my territory.

Q. I see.

A. But I know it was definitely the first week in March.

[fol. 251] GEORGE SWIFT TROW, one of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Mr. Trow, where do you live?

A. Greenwich, Connecticut.

The Court: Speak a little louder, please.

The Witness: Greenwich, Connecticut.

Q. On October 24, 1939, were you in the employ of the White Plains Publishing Company?

A. I was.

Q. In what capacity?

A. As a reporter.

Q. Did you work in the White Plains office at that time?

A. Yes, sir.

Q. What time of the day did you start your work?

A. About 8:15, never later than 8:15 at night.

Q. You started before 8:15 P. M.?

A. Yes, sir.

Q. And you worked until how late?

A. Until at least 4:30 and on a couple of nights a week till 6:30 or later in the morning.

Q. How many nights a week would that be?

A. Six.

Q. So, for four nights a week you worked from before 8:15 P. M. until after 4:30 A. M., and then on two additional nights you worked from before 8:15 P. M. until after 6:30 A. M.?

[fol. 252-275] A. At least two nights a week; sometimes more.

Q. How long did you work this night period?

A. I worked from, let us see in March—I have to refresh my memory on that if it is all right. For the period in question which is from October 24, 1938, until—

Mr. Hanson: Just a minute, your Honor. How are you refreshing your memory?

The Witness: I have a memorandum here, sir.

Mr. Hanson: Another one of these now?

The Court: It is another one, is it not?

Mr. Roach: Oh, well, I object to the tone of the voice "Another one of these."

The Court: The court reporter will not get the tone of the voice and I may forget about it.

The Witness: Till March 8, 1939.

Mr. Hanson: Let us find out more about the memorandum.

The Court: Yes.

By Mr. Hanson:

Q. What is the memorandum from which you are refreshing yourself?

A. The memorandum is a record of the number of hours or the period that I worked all split up into various times. Sometimes I worked nights and sometimes days, and I was on general news in the north county.

Q. In what county?

A. There were several salary changes.

Q. In what county?

A. I used to work up in the northern part of the county.

Q. In the northern part of the county?

A. Yes.

[fol. 276] Q. And the files that you refer to are the files of the printed copies of the newspaper on which you worked?

A. That is correct, sir.

Q. Practically all of your work was done in Westchester County, about Westchester matters; is that not true?

A. With a few exceptions, yes.

Q. Where were they?

A. Well, occasionally I would go over to South Norwalk to cover boxing bouts, and to Greenwich to cover a horse-shoe match but they were very rare.

Mr. Roach: Those were in Connecticut?

The Witness: Yes, sir.

Q. You never reported any overtime?

A. No, sir, except when I was asking for a raise I usually pointed out I was working quite a long while each week.

Q. You got those raises, did you not?

A. I got some of them.

Q. You got quite a number of raises in a short time?

A. I got raises from \$15 to \$25 in three years, yes, sir.

Q. What experience had you had in newspaper work before you came to this paper?

A. I had been on the Pleasantville Townsman in Pleasantville for a year.

Q. That is a weekly newspaper, is it?

A. Yes, sir.

Q. Did you have any daily experience before you came here?

A. No. I had been on a weekly in Greenwich, Connecticut also before that.

Q. You would not say that either one of these exhibits was absolutely accurate, would you?

[fols. 277-285] A. They are absolutely accurate as far as the minimum number of hours worked in any week is concerned, yes, sir.

[fol. 286] WILLIAM L. O'DONOVAN, one of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Mr. O'Donovan, you are one of the plaintiffs in this action?

A. I am.

Q. You reside where?

A. At 99 Harvard Drive in Hartsdale, New York.

Q. Were you in the employ of the White Plains Publishing Company, publisher of the Daily Reporter, between October 24, 1938, and the last part of December, 1940?

A. I was.

[fols. 287-294] Q. How long had you been in the employ of the White Plains Publishing Company before your services were terminated?

A. I had first worked there in September, 1927; and with the exception of two periods of absence where I was either traveling or working elsewhere, I had worked for a total of 12 years for the Daily Reporter.

Q. In October, 1938, you were employed in what capacity?

A. I was in the News Department in the Daily Reporter.

The Court: Did you have any title other than being in the News Department?

The Witness: Yes, sir. I was known as the city editor.

Q. What time of the morning did you start your work?

A. I began my work before 8:30 in the morning.

Q. What time did you finish your work for the day?

A. It varied with different days of the week. From Monday through Thursday I worked from 8:30 until after 6; on Fridays I finished after 5, because I went to New York for National Guard drill; and on Saturdays I usually worked till 2 o'clock.

Q. During that time did you take out for lunch and, if so, how much time?

A. I had very little time for lunch. At most, a half an hour. I quite frequently had a sandwich or a glass of milk or a bottle of milk brought in to my desk, and on very rare occasions I would take more than half an hour for lunch.

Q. How about on Saturdays? Would you take any lunch period then?

A. Not until after we had finished the Saturday paper.
[fol. 295] Q. To what extent?

A. Depending on the size of the special edition, and depending on how far in advance it could be prepared.

You understand we have this one news staff that worked the shift during the day with the exception of a very short period when we had a night man on there. We had to get the day's paper out of the way before we could start to work on a special edition.

During the late afternoon we would handle what copy we could, and toward the date of the publication it was incumbent upon me to come back and help in the final blocking up of the paper and checking and proof reading and checking captions and getting pictures and layouts made and otherwise helping to make sure we would have this special page ready so that when we went to press, the day of the week that was normally run, they would either be run off at the same time or they would have been run off the night before and inserted by hand on Election Night, depending on the year and depending on whether it was just a city or county election or state or national election. The hours varied.

Q. During the period October, 1938 to January, 1941, did you have in the office of the Daily Reporter teletype machines?

A. We did.

Q. How many?

A. We had two different services during the period on each one, and one service, I think it was the county wire, we had one machine.

Q. That brought news from what source?

A. That brought news from all over the world, delayed through the County News Bureau, which was operating [fol. 296] from here in White Plains. That furnished us with both national and international news from AP, I believe, and we received county news over that wire from the various county bureaus, or, rather, the County Bureau which received it from the various papers in Westchester affiliated with that service.

Then in March, on March 1, 1939, we had to give up that service, and we entered into a contract with INS, the International News Service. They put in two machines, but the same service came over either one. It was simply a factor of safety to have a double machine.

Q. Did you have another teletype machine that brought in your news from the Pleasantville office?

A. For a short period we had a teletype set-up with our Pleasantville office which was operated by Mr. Barnum, and it was received, of course, in the news room of the Daily Reporter. To the best of my recollection, that was, in effect, for about two months.

Q. Is that all?

A. Yes.

Q. These machines that brought in the national news from AP or International News Service, how much of the day were they in operation?

A. They would come on at 6 o'clock in the morning as a rule and be operated until 6 o'clock at night unless we asked to hold the wire open for a special coverage.

Q. Who would take care of the teletype machines in taking news off of them and so on?

A. During the period under discussion it was Mr. Mabec with, of course, the fact that Mr. Hogan or I or anyone who was there and interested in a special story would come in and if the ticker was running over or if we had [fol. 297] some special interest in a story, we would take it off also, but largely the responsibility of taking the copy off the wire and filing it on the various hooks and categories of national interest and local and county and state news would be the job of Mr. Mabec.

Q. Did he turn the ticker off at night, do you know?

A. He usually turned it off at night.

Q. With respect to the International News Service, how many tickers were there?

A. There were two tickers but it was not the same one that alternated. In other words, the service was received on a ticker and we had an extra one there as a matter of safety in case something went wrong, but there was just one service. We happened to have two machines so that we would not miss anything.

Q. Mr. O'Donovan, have you gone through the files of the Daily Reporter between October 24, 1938, and up to the time of the termination of your services—when was that?

A. That was in the latter part of December.

Q. Nineteen hundred and what?

A. 1940.

Q. Did you go through the files?

A. I did.

Q. Of the Daily Reporter during that period?

A. I did. I went through the files covering that period.

Q. Yes. And as a result of that review did you make up a statement showing the overtime you put in for night work?

A. I have a summary here of overtime on the minimum basis. I have gone through the files and picked out certain events that I covered and certain meetings at which I know I was present, and certain factors in the publication which [fols. 298-322] I know that I covered or worked on, such as special editions, and I have compiled a minimum amount of time that I spent on those different things, week by week.

[fol. 323] Q. You had no interest at all in this Civic Federation or in the Community Chest or in the Housing Project or anything else of a civic nature around here except as it related to your work on the Reporter; is that correct?

A. I would not say that is correct; no, sir.

Q. But in this memorandum you charge your employer, of which you were then a stockholder and which you are not now, for overtime for every meeting of any of those civic associations where you actively participated and where you attended; is that not correct?

A. That is not correct. I only put that in the claim for the time that I had to go back to the office and write a story in my capacity as a reporter at those meetings which I attended and for which there is no listing on this summary at all.

Q. Getting back to these tickers and the changes, and getting away from the summary for a moment, is it not a fact that you got very little Associated Press news when you were getting it from the Associated Press tickers?

A. We got very little? I do not know. I was not in the business department, but I do not think we had a franchise to use the A. P. news, so it was almost all county news entirely.

Q. Is it not a fact that during your entire service as city editor as reflected in this complaint here that you used [fol. 324] very little Press Association news in the paper?

A. We did earlier, but when the war broke out—in fact, we ran a full page advertisement toward the end of February, 1939, which had Mr. Tuller's and Mr. Hogan's names at the bottom of the page, that due to the fact that the war would influence everyone's life we would continue or, rather, we would expand our international news, and we then announced that we were taking the service of the International News from March 1, 1939, and we would continue to give local news, but at the same time we would implement it with national and international news because of everyone's interest in world conditions.

Q. You did that for about two or three months?

A. Oh, no. We did that right up until the time—I cannot say that is the time I left because I do not recollect whether the ticker was still there.

Q. Did you not actually go off the regular International News ticker service and just get a telephone pony service from it?

A. That is the reason I qualified my last statement. I am not sure whether the ticker was up at the time I left, but I am quite sure it was there more than three months from the time we instituted the service.

Q. It was a relatively few months, was it not?

A. I would say it was there certainly during the remainder of the year 1939.

Q. The purpose of the White Plains Reporter was to serve the community of White Plains with information, was it not?

A. Correct.

Q. And it specialized in local news; is that not correct?

A. That is correct.

[fol. 325] Q. Is it not also a fact that for many years you never carried any foreign and international news on the front page of your paper?

A. Unless we could get a local angle.

Q. Unless you could get a local angle?

A. Yes.

Q. And in journalistic circles it created rather a sensation when you printed the picture of the ex-King of England on your front page, did it not?

A. That is correct, and I also had a local angle for it.

Q. And that is the reason it went on there and that is the explanation you make?

A. That is correct.

Q. So that your sole purpose was to serve the people right here in White Plains and the adjacent vicinity in Westchester County, was it not?

A. I would like to stop here and say that at the time we printed the picture of the Prince of Wales or ex-King of England was during 1936 and did not come in during this action at all.

Q. Did you print any pictures after that on your front page except local pictures with a local angle, any other pictures?

A. No. From time to time we used mat sections with the mat service from INS and we printed pictures of the war in Europe. We used French, German and other individual pictures of people who were connected with the war. In fact, we put out a special edition one morning devoted to nothing but mat pictures with pictures of the Nazis invading Paris.

Q. You spoke of the composing room running two shifts part of the time. They did not run two shifts just to set up news copy and editorial copy, did they?

A. No.

Q. Did they?

A. No.

[fol. 326] Q. About what proportion of the total contents of your paper was devoted to advertising and what proportion devoted to news?

A. Well, that fluctuates, as you know from your experience in the newspaper field. We had a quota that was difficult to maintain. Any daily paper would be 60-40, perhaps.

Q. Sixty of what?

A. Sixty per cent of advertising and forty per cent of news, but different days of the week, when the advertising was low, we had to have copy ready to fill in. I am sorry to say we would not always achieve that quota or that ratio.

Q. You had certain days of the week, did you not, Mr. O'Donovan, that were known as heavy days and other days as light days?

A. That is correct.

Q. In other words, Tuesdays and Saturdays were usually light days, were they not?

A. That is right.

Q. And your Wednesdays and Thursdays and Fridays on the paper were your heavy days?

A. That is correct.

Q. You would print more pages?

A. We printed more pages, and in order to offset these light days efforts were made to put in special features on Tuesdays to fill up the paper. In other words, it was rather a difficult thing. We called the special pages the home page and the cooking page on Tuesday so as to have the advertising department solicit special advertising and build up that one light day.

Q. The home page was for the readers around here?

A. That is right.

Q. And the cooking page was for the people around here, too?

A. For the people who bought the paper.

[fol. 327] Q. And most of them are right around here?

A. Most of them.

Q. Practically all, were they not?

A. As far as I know.

Q. Yes.

The Court: What do you mean when you say "practically all"? He said, "practically all" and you said "Yes." What do you mean by that?

The Witness: Well, Mr. Hanson means all. He means to repeat that, rather.

The Court: He used the words "practically all" and you said, "Yes." You said first just a majority and then he said "practically all" and you said "Yes." I would like to know what you mean by "practically all." It is your answer that I am interested in and not his question.

The Witness: He said "practically all" and I meant that a majority of our circulation was in Westchester County.

Q. Do you know anything about the circulation figures of the paper, Mr. O'Donovan?

A. Not of my own knowledge. That is, from our records I know what we published from time to time in promotional advertising.

Q. Would you know how many papers were distributed outside of the State of New York?

A. That was never contained in the promotional advertising.

Q. You have not any information on which you could state?

A. I have none, of my own knowledge.

Q. Do you know that any went outside of the State of New York, of your own knowledge?

[fols. 328-346] A. Only that I know we ran a coupon during, oh, June, which was a special announcement to county or local residents who were going away, to have the Reporter follow them, and I know from checking up on it that a certain number of these people would get the paper sent to them when they went out of the State on a vacation to parts of New England or the mountains or the Jersey shore.

Q. You were urging them to keep in touch with the local community news while they were away?

A. That was part of the Advertising and Circulation and Promotion Departments' work.

Q. Did the Advertising Department furnish some copy to keep the composing room busy on these nights that it worked?

A. They did.

Q. You have not any idea as to the proportion between what the Advertising Department furnished and the News Department, have you?

A. I could not say, because some of the copy they had was very hard to set. In other words, these full page grocery ads are very difficult to set. Other times they had an ad with an electro made and a mat and they would just set up the base and toss it on.

Q. As you have stated, Mr. O'Donovan, that the issues of the paper varied from day to day in size and content, is it not a fact that the work week for anyone engaged in news or reportorial work will vary from day to day, according to the breaks of the news?

A. That is correct.

Q. And the assignments to be covered?

A. That is correct.

The Court: What do you mean by that?

[fols. 347-355] Redirect examination.

By Mr. Roach:

Q. When you wrote these editorials, were you formulating your own policies or were you carrying out the policies of the company as laid down by others?

A. I was carrying out the policy that had been established prior to the time Mr. Hogan may have been absent.

Mr. Roach: That is all.

(Witness excused.)

[fol. 356] DEPOSITION OF MR. FANNING

"Q. Mr. Fanning, what do the records of the White Plains Publishing Company show with respect to the national advertising between October 24, 1938 and March 1, 1941?"

Mr. Hanson: What page is that?

Mr. Roach: The very first question (reading):

"A. Well, the only records I could find are the ledger sheets which show the agency and the account. There are a number of them, but I did not take them with me.

"Q. Do they show that between those dates the White Plains Publishing Company did have national advertising?"

"A. Yes.

"Q. And they had national advertising all during that period?"

"A. That's right.

"Q. From your inspection of the records would you say it was the usual comparison between national advertising and all the advertising in a paper of similar size?"

"A. Yes, I would.

"Q. From your inspection of the records did you learn what advertising mats were furnished by Meyer-Both of Chicago?"

"A. Yes, that's right.

"Q. And from your inspection of the records did you learn that half-tone and line cuts for reproducing pictures

were furnished by Basil F. Smith Company of Philadelphia, Pennsylvania?

"A. Yes.

"Q. By 'national advertising' we mean those products that are widely and nationally advertised, such as tobacco, cigarettes, automobiles, tires, radios, washing machines, refrigerators, etc.

"A. Yes.

[fol. 357] "Q. Did you bring along with you the records of the White Plains Publishing Company with respect to its out-of-state circulation between October 24, 1938 and March 1, 1941?

"A. I brought the only records I could find.

"Q. And what do they show?

"A. They show the original record of the cancellation of the subscriptions as at February 28, 1941. That's the only original record that exists as of that date or any other date, outside of the audit made by the Audit Bureau of Circulation as of the 12 months ending March 31, 1940 and the 12 months ending March 31, 1939, there were at the close of business on February 28, 1941 when the paper discontinued 40, of which 7 of the 40 were going to men of the service. The audit report of March 31, 1940 for the previous 12 months' period shows 46 copies were going to other states other than New York, and the audit report for the 12 months' period ending March 31, 1939 shows 43 going to states other than New York."

And in the other examination, page 4—I think the other things your Honor mentioned are in.

Mr. Hanson: I take an exception to your Honor's ruling.

The Court: Exceptions are automatic so far as the introduction into evidence of offers are concerned, but exceptions are required to the Judge's charge, but it is just as safe to have one anyway.

Mr. Roach: I think that covers it, your Honor.

Mr. Hanson: I except to the reading of those parts of that deposition at this time.

[fol. 358] Now, your Honor, I have several motions. I thought we would go along this afternoon, but if I could have a very brief recess, I think I could get those ordered up the way I want to make them and the way I want to discuss them.

The Court: All right, sir.

(Short recess).

MOTION TO MAKE ALLEGATIONS OF COMPLAINT CONFORM TO THE ACTUAL PROOF

Mr. Roach: I have just one other motion to make, your Honor, and that is a motion to make the allegations of the complaint conform to the actual proof.

Mr. Hanson: I understand that is entirely within the discretion of the Judge, your Honor, but I think that motion certainly should be disallowed in view of the fact that the allegations of that complaint are so far from what he has attempted to prove that we did not even know what we had to meet.

The Court: I think I will grant his motion and give you an exception. In practice here it is within the discretion of the Court.

Concededly, there are two or three paragraphs of the complaint which are confusing or confusing to anyone that attempts to reconcile them.

Mr. Hanson: I note an exception to that.

The Court: Yes.

MOTION TO DISMISS COMPLAINT

Mr. Hanson: Now, if your Honor please, I desire to move to dismiss the complaint in its entirety because of the failure of the plaintiffs to make out a *prima facie* case; and in support of that motion I should like to discuss the [fol. 359] law rather briefly.

(Legal discussion off the record.)

The Court: Concededly, of course, Counselor, there are a great many very involved questions of law.

I think from a practical viewpoint it is better for me to reserve decision on your motion to dismiss and hear your proof. I mean by that, even from your own argument it is a matter of deep study, I think, on my part and rather than determine from just hearing your argument and hearing your opponent argue it, I can see that there are a great many questions involved, and you have raised a great many, and I am going to reserve decision on your motion and hear your proof.

Mr. Hanson: Now, if your Honor please, I cannot finish or get started really with one witness this afternoon. I think if we could meet here tomorrow morning at the usual hour I could proceed and wind up my proof tomorrow.

The Court: I think that is a perfectly natural request. We will adjourn until tomorrow.

(At 3:36 P. M. an adjournment was taken until Thursday, February 18, 1943, at 10:00 A. M.)

[fol. 360]

White Plains, N. Y.,
February 18, 1943,
10:20 A. M.

Met pursuant to adjournment at 10:20 A. M.; present as before.

The Court: Counsel for plaintiffs has furnished to me what appears to be ample authority for the request to amend even the amended demands in the complaint, but, Mr. Roach, I think in order to make any amendment we have to know what it is. You will have to make your computations.

Mr. Roach: I will do that, your Honor.

The Court: When we speak about amending the complaint to conform to the proof that might be computed by the Court, but I cannot compute what you ask as a total amount.

Mr. Roach: I will do that.

The Court: If you want to look at those cases, from the Court of Appeals and one from the Appellate Division, you may do so. You have an exception to my ruling.

Mr. Hanson: I have an exception to the ruling. I assume he will submit those cases to me.

The Court: Oh, yes. They are right there.

Mr. Hanson: I would like to have the citations in the record, if you will give them, Mr. Roach, and then hand the cases to me.

[fol. 361] Mr. Roach: Dunham v. Hastings Pavement Company, 95 App. Div. 360, N. Y.

The Court: What is the particular part that has reference to this question?

Mr. Roach: Knapp v. Roche, 62 N. Y. 614.

(Discussion off the record.)

Mr. Hanson: Yesterday your Honor asked a question while I was arguing but I must confess to a slight physical infirmity which I do not brag about, and that is a slight deafness. I thought you asked me if the Courts had de-

defined commerce and I replied that they had defined commerce.

The Court: I think I asked you whether or not the statute had done so.

Mr. Hanson: So I was informed afterwards. There is in the statute, and I would not want to leave any misapprehension, in Section 3B of the statute a definition of commerce and also, I think, in Section 3B, I will tell your Honor in just a minute—in Section 3B of the Act is a definition of commerce; and in Section 3I of the Act there is a definition of goods, I mean covering those who are engaged in commerce and those who are producing goods for commerce.

The Court: Do you say commerce means commerce according to the definition?

Mr. Hanson: Yes. Commerce means commerce and so the Supreme Court of the United States held about three weeks ago, that is about the answer on that, but I did not [fol. 362] get the question when your Honor asked it.

The Court: I meant a statutory definition of commerce.

Mr. Hanson: Yes. I am ready to proceed, your Honor, if Mr. Hogan will take the stand.

WALTER V. HOGAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hanson:

Q. Where do you reside, Mr. Hogan?

A. 2 North Broadway in White Plains.

Q. Were you at any time connected with the defendant, the White Plains Publishing Company?

A. I was.

Q. For how long a period?

A. Twenty-three and a half years.

Q. When did your connection with the defendant cease?

A. February 28, 1941.

The Court: February 28, 1941?

The Witness: 1941.

Q. During the period from October 25, 1938 to February 28, 1941 did you hold any position with the company?

A. Well, I was editor of the paper, and I was an officer of the company, vice president and treasurer.

Q. As editor of the paper were you familiar with the work of the plaintiffs in this case?

A. I was.

Q. Were you familiar with the work of Mr. O'Donovan?

A. I was.

Q. Did you hire Mr. O'Donovan in the first instance?

A. I did.

[fols. 363-371] Q. What was Mr. O'Donovan's position on the paper on October 24, 1938?

A. He was city editor.

Q. Will you explain what the duties of the city editor were?

A. Well, he determined news policies of the paper, and made up the front page and selected news to go in the paper, to be featured above the other news. He made up the assignments, the assignment slips, giving the place to work to each man and woman.

Q. Was it also customary for the city editor to do a considerable amount of writing?

A. Not a considerable amount of writing, no. He wrote heads. He did some writing; not a considerable amount.

Q. Did he have the selection of whatever assignments he gave to himself or did somebody else give them to him?

A. He had his own assignments if he cared to go any place.

Q. He did make assignments, is that correct?

A. Yes.

Q. Did you ever assign him specifically to go out and cover a story between October 24, 1938 and February—and December 31, 1941?

A. Not to cover a story. I may have asked him to go to some of those meetings when I could not go to a meeting where the paper might be interested in having someone there.

Q. Would that be a meeting that would deal with certain of the policies of the paper or certain of the programs or promotions of the paper?

A. That is correct.

Q. It would not be just an ordinary news assignment. It would be something that would have policy connected with it; is that correct?

A. That is right.

[fol. 372] Q. While you were away during that period of illness, he had full charge of the editorial page, did he not?

A. That is correct.

Q. And was entirely responsible for what went on?

A. That is correct. I was not available.

Q. How long were you a stockholder in this paper, Mr. Hogan?

A. For the full twenty-three and a half years.

Q. And at the time the paper suspended what was your approximate interest in it?

A. My approximate interest in the paper?

Q. Yes. One-tenth?

A. One-third.

Q. One-third?

A. Yes.

Q. You were quite familiar with the purposes and policies of the company, were you not?

A. I was.

Q. What was its purpose?

A. Its purpose was to serve the people of White Plains and the neighboring communities with their news and with such advertising as we could present to them and comment on the day's news. It was strictly a local newspaper.

Q. Did you ever go out and seek any out-of-state circulation?

A. No.

Q. Did you not, in fact, during the summer months, urge White Plains residents to keep in touch with the affairs in their local community while they were away, by having the Reporter follow them?

A. Yes.

Q. But other than that you made no effort to build up out-of-state circulation; is that right?

A. None at all.

Q. And you did not want it?

A. No.

[fol. 373] Q. So that any that you had might properly be described, could it not, as just an incident to your purpose of serving this community?

A. Yes.

Mr. Roach: I think I am going to object to that.

The Court: Yes. I think so. Strike the answer out.

Mr. Roach: It seems to me, Mr. Hanson is doing the testifying and Mr. Hogan is just saying "Yes." It is very much leading. I do not like to interrupt.

Mr. Hanson: Well, of course, I understand the rules of leading. I can reframe the question.

The Court: That is not your objection to the last question that it was simply leading. If it is, of course, I will overrule it.

Mr. Roach: All right.

Q. Did you ever have any interest in out-of-state circulation?

A. No.

Q. Did you make any money on any of your circulation?

A. I think not.

Q. Where did the major portion of your revenues come from?

A. Advertising.

Q. What was the major portion of your advertising?

A. Local advertising.

Q. Mr. Hogan, did you have any set office hours at the Reporter's office where a man was supposed to come in, say, at 8 o'clock in the morning and stay there until 6 o'clock or 5 o'clock in the afternoon?

A. They were supposed to come in at 8 o'clock in the morning [fols. 374-382] but there was no time set for them to stay. I mean, they were supposed to come to work at 8 o'clock and work pretty intensively up until the time the paper went to press.

[fols. 383-387] Q. When was it that you found out about this new Wage and Hours Law?

A. In the latter part of 1938.

Q. Well, was it about the time that it became effective?

A. About the time it became effective. It was adopted back in June, I think, and became effective in October.

Q. Was it when it was adopted and passed that you first knew of it?

A. Yes.

Q. Therefore, you knew of it back in June of 1938; is that correct?

Mr. Hanson: Wait a minute. I did not get the date.

The Witness: In the latter part of the summer of 1938, whether it was June or July, I do not know.

Mr. Roach: June 25, 1938.

Mr. Hanson: That is correct. Effective 90 days there-
after or 120, or something like that.

Q. Does that refresh your recollection that it was in June
of 1938?

A. Yes.

Q. And it was then that you had a talk with Mr. O'Dono-
van?

A. Yes. Some time after that, in the summer there.

Q. And Mr. O'Donovan said to you, "There is a new
law coming along. You can't work those people more
than 40 hours a week"; is that correct?

A. That is correct.

.

[fol. 388] The Court: What do you mean by "time copy"?

The Witness: "Time copy" is copy which does not have
to run on any particular date. It can be run on Monday
and run on Friday.

Q. From time to time did you sponsor various contests
of one kind or another?

A. We did.

Q. Tell us some of the things you sponsored. There was
a Soap Box Derby, was there not?

A. There was.

Q. And that was sponsored by the Reporter?

A. It was.

Q. And involved a lot of work, did it?

A. It involved a lot of work by Mr. Tuller and Mr.
Tukey.

Q. And nobody else?

A. Hardly anybody else.

Q. Did it involve nobody else working on it besides those
people?

A. Mr. Tuller handled all the promotion of it practically.
Mr. Tukey did practically all the writing of it. He was
there during summers. The rest of us took an interest
in it. I do not think anybody did a great deal of extra
work on it.

Q. Was there any special edition because of that?

A. It was handled by the same two, Mr. Tukey and Mr.
Tuller.

Q. Nobody else had anything to do with the special edition?

A. Mabee had a little; not much.

Q. What are some the other things you sponsored along that line?

[fols. 389-392] A. Well, some were contests in co-operation with the theatres. I do not recall just what they were.

.

[fol. 393] The Court: Would Mr. Mabee have some work?

The Witness: Mr. Mabee would have some. I do not think the others would have, maybe occasionally, Judge.

The Court: All right.

The Witness: Not every day.

The Court: All right.

By Mr. Roach:

Q. How late did Mr. Mabee work?

A. How late did Mr. Mabee work?

Q. That is the question.

A. Maybe around 3 or 4 o'clock.

Q. Who had charge of the teletype?

A. The teletype was very incidental in our office. It required—

Q. Who had charge of it? That is the question.

Mr. Hanson: Let him answer.

A. Who had charge of it?

Mr. Roach: I would like to get an answer to my question.

A. Mr. O'Donovan had charge of it.

Q. The teletype was turned on at what time in the morning?

A. I think it was generally on, turned on by Miss Hasselbach around 7 or 7:30, usually.

Q. You do not know?

A. I do not know for sure.

The Court: What did you get on the teletype? Pardon me for interrupting you.

Mr. Roach: Yes.

[fol. 394] The Witness: When we were affiliated with the County News Bureau county news came in with Associated Press bulletins.

When we went to the International News Service then news came in over that service.

The Court: Did not anyone watch it at all? Did not anybody have the duty of watching it?

The Witness: Mr. Mabee used to take copy off of it.

The Court: Go ahead.

Q. The teletype went off at what time?

A. I am not sure of the time, Steve. I think 6 o'clock.

Q. Who took it off up to that time?

A. It was shut down around 3 o'clock. There was not any occasion for us to look for afternoon news. Mabee would shut it off.

Q. Suppose an important thing came in at 5 o'clock in the afternoon? Would not somebody take it off the teletype?

A. There would not be anything important enough at 5 o'clock off the teletype for us to be interested in. We were not much of an international newspaper—

Q. The teletype—

Mr. Hanson: Let him answer.

A. (Continuing:) We used it mostly for copy paper.

Q. The teletype was running up until 6 o'clock, do you say?

A. That is correct.

Q. News would come in after 3 in the afternoon?

A. Not news that we were interested in.

Q. What type of news were you interested in?

A. There would be nothing that could be taken off the ticker in the afternoon that would be of any good for us until the next day.

[fol. 395] Q. What type of news were you interested in?

A. White Plains and Westchester County.

Q. White Plains and Westchester County news?

A. Yes.

Q. Did that not come over the teletype?

A. County news came over the teletype, a little of it.

Q. Did not that come over during the afternoon?

A. Very little, if any.

Q. And at no time, especially after the competition started, were you interested in national news?

A. Especially after the competition started there was not anything in the afternoon that would interest us on the ticker, because by next morning it would be dead.

Q. I asked you, Mr. Hogan, whether you said especially after your competition started on March 1, 1939, you were interested in national news.

A. Not to any great extent. A little in the morning.

Q. The competition did have a lot of news, did it not?

A. That is right.

Q. And you did have some national news before that, did you not?

A. Before the competition?

Q. Yes.

A. We used hardly any.

Q. Did you have national news?

A. Did we have national news in the paper?

Q. Yes.

A. A little.

Q. And you increased your national news after the competition started, did you not?

A. The paper did, yes. Mr. O'Donovan had an idea that he should meet this competition with national news, and I was ill most of the time, but when I came back I kind of stopped it because I did not think we should use so much.

[fol. 396] Q. You were not interested in keeping up with the competition?

A. Not in so far as the national news was concerned.

The Court: I think we will take a short recess.

(Short recess.)

Q. Mr. Hogan, did you have occasion to do night work?

A. Not very much.

Q. How often would you work nights?

A. I could not say now; Stevé.

Q. About how often; can you give us any idea?

A. Do you mean work in the office?

Q. In the office or outside the office. Did you ever cover any meeting of any kind?

A. Used to go to a lot of meetings. I do not suppose you could call it coverage. Frequently I used it.

Q. In the interest of the newspaper?

A. In the interest of the newspaper, yes, sir.

Q. Did you write a column?

A. Part of the time.

Q. Did you go to any gatherings for the purpose of writing your column?

A. No.

Q. Did you go to any gatherings for the purpose of writing editorials?

A. No.

Q. You wrote editorials?

A. Yes.

Q. And you said that Mr. O'Donovan went to gatherings or meetings on occasions when you could not go?

A. Yes.

Q. Then you did go to gatherings and meetings on behalf of your company, did you not, and when you could not go you sent Mr. O'Donovan; is that the idea?

A. That is right. I did not send him particularly. I [fols. 397-403] asked him if he would go. I mean, it was not a strict order.

.
[fol. 404] Q. Junk copy?

A. Maybe it is a good name for it, but you had a lot of that on hand, whether it was junk or not. Your newsman had to prepare it. We did not prepare a great amount of it every Sunday, you know. We just prepared enough to keep them going.

Q. I did not mean you prepared it on Sunday.

A. I would write heads for an hour and you would have all that would keep your men going.

Q. Did the newsmen prepare that?

A. The newsmen prepared very little of it. Most of it came through the mail.

Q. You had a Hollywood column, did you not?

A. We did.

Q. That came over the teletype at 5 o'clock in the afternoon?

A. I do not recall the time it came over.

Q. And there were other features that came over the teletype machine?

A. I do not recall.

Q. How about Dr. McCoy's column; how did that come?

A. By mail.

Q. How about Milton Parker's column?

A. That was on the ticker, I believe.

Q. That came over late in the afternoon, too, did it not?

A. I do not know what time it came over. I do not think it came very late. I do not know.

Q. Do you know what came over the teletype machine during the afternoon?

A. No, not everything that came over in the afternoon.

Q. Do you know how important the stuff was that came over in the afternoon, as far as your business was concerned?

A. As a general rule, everything that came over in the [fols. 405-410] afternoon was not worth very much to us the next day at 2 o'clock in the afternoon.

[fol. 411] Q. And he worked how late in the day?

A. Well, he worked pretty hard up to half past 10 or 11 o'clock.

Q. You paid those men for all their work and not for just working hard, did you not?

A. I said he worked right in the office until about half past 10 or 11 o'clock.

Q. I did not ask you how long he worked hard. I asked you how long he worked.

A. In the office until half past 10 or 11 o'clock.

Q. Then what did he do?

A. Then his time was his own to pick up the stuff as he could.

Q. I said, why did he have to get in at 7?

A. That was the arrangement which the sports editor usually made with his assistant. The sports stuff, you see, we closed down—

Q. I did not ask you that.

Mr. Hanson: Let him answer the question.

Mr. Roach: He answered and started something else.

The Witness: We closed the sports off at 11:30.

The Court: I do not think he quite finished.

The Witness: All sports were supposed to be closed off at 11 or 11:30, to get out of the way for the rest of the paper.

Q. Did the sports come over the teletype first?

A. I do not think we ever used any sports off the teletype. Very occasionally.

Q. All of these men have testified that they took sports off the teletype.

A. I know, but they testified it was a very difficult job going over and ripping a piece of paper off the teletype machine.

Q. They testified to that?

A. They made it appear that it was.

[fol. 412] Q. Is there anything funny about this, Mr. Hogan? Did they testify that it was a very difficult job, tearing off teletype tape?

A. They made it appear as if it was a tough job.

Q. When did you hear that testimony?

A. They tried to make it appear as if it were a very difficult job to take the tape off the teletype, although I do not recall when I heard it, but I do recall it.

Q. The news stories, as you take them off the teletype machine, do you print them as you take them off in the same form?

A. Practically.

Q. Are there some stories that are taken off and changed?

A. Occasionally.

Q. They are headed?

A. Some.

Q. Headed?

A. Yes.

Q. Did Mr. O'Donovan spend a great part of his time down in the composing room?

A. I would not say that he spent a good part of his time there, no.

Q. Did he spend some part of his time there?

A. Yes.

Q. About how much of his time would you say?

A. I do not know the exact time, but if he spent more than half an hour a day, he spent a lot of time down there.

Q. When Mr. O'Donovan took over his own duties and yours when you were away for a good part of the time during one particular year, he became an extremely busy man, did he not?

A. I imagine he did.

Q. Would you say that during that period he worked a great number of hours?

A. Well, I do not know about a great number of hours. He did a great deal of work.

Q. Would you say that during that period he worked [fols. 413-427] more hours than prior to the time of your going away?

A. Well, I was not there. I do not know the hours he put in, but Bill was pretty good on delegating his work to others. I do not imagine he put in a great deal more time.

[fol. 428] Q. What do you mean by "a little earlier"?

A. Maybe 7:30, between 7:30 and 8. I do not remember every minute, you know. This is three and a quarter years ago.

The Court: If you did not get there until 10 o'clock, you could not tell very well, I suppose.

Q. What time were they supposed to get there, 7?

A. They were supposed to be there—Mr. Salter, he could come in any time he liked. If he chose to come in at 7:30, he could come in at 7:30 or 7 o'clock. He was sports editor, assistant sports editor, and his time was all his own.

Q. Do you really mean he could come in at any time he wanted to?

A. Mr. Salter could come in at any time he wanted to.

Q. 10 o'clock?

A. If the work were done, he could come in at 10 o'clock.

Q. When was he supposed to start his day?

The Court: Have you not been all over that?

Mr. Roach: This witness has said they were all supposed to be there at 8 o'clock.

Q. You said that, did you not; isn't that correct?

A. That is right.

The Court: If he could not tell what time they left, how could he answer?

Q. After October, 1938, for a while you got your county news how?

A. Over the news ticker.

Q. After October, 1938?

A. Yes. Over the news ticker.

Q. About how long did you get it over the news ticker?

[fols. 429-441] A. Up to February of 1939, I believe. I think it was discontinued probably on the 28th of February, 1939, the next day, I think, that this trouble started.

Q. You got it through the County News Service; was that it?

A. Yes.

Q. And the County News Service had what sort of coverage, courthouse and some Westchester County?

A. Plus Associated Press Dispatch.

Q. With a wire for Westchester County?

A. Speaking generally, yes.

Q. Was that a service operated by the Macy chain?

A. Yes.

Q. With respect to getting coverage of Westchester County news at that time you merely got it from your ticker, did you not?

A. Yes.

Q. And then that service was taken away from you by the County News Service when?

A. On or about March 1, 1939.

Q. What service, if any, did you have to supplant that?

A. For the County of Westchester?

Q. For the County of Westchester.

A. I think in the meanwhile we also sent Barnum up-county, had we not, according to your records? We did not put any extra coverage on for the county. We put a man on the courthouse.

Q. Yes?

A. I believe, and that is all, and bought the International News Service.

Q. The International News Service covered the national and international news, did it not?

A. That is correct.

Q. It did not cover your county news?

A. No.

Q. Prior to the County News Service taking away your news service, you did have a man in the courthouse, did you?

A. Not to my best recollection.

[fols. 442-444] Q. It was up to the foreman of the composing room to distribute the work so that the current stuff got out first and your so-called time copy was held to take up the lag; is that correct?

A. That is right.

Q. To whom did the foreman in the composing room go if he ran short of copy?

A. He would go to O'Donovan.

Q. That is, for news copy?

A. For news copy, yes.

Q. How about advertising? Did you not have any schedule of advertising that had to be published?

A. Oh, yes. Mr. Alexander was the advertising manager.

Q. Did you have an advertising schedule for certain of your advertisers regularly?

A. That is right, yes.

Q. That is, to take so much space on Monday, so much on Tuesday or Wednesday or Thursday and divide it up?

A. Yes.

Q. The foreman of the composing room was supposed to know about those schedules, was he not?

A. Yes.

Q. Was it not one of his duties to check and see that the advertising copy got in there on time to reach the paper?

A. Yes.

Q. So that the composing room had to set more than just news copy?

A. Yes.

Q. You also spoke about the fact on cross-examination that the material which came off the teletype was just incidental. Do you mean that was national and international news; is that correct?

A. That is correct.

Q. You were not interested greatly with that type of news, were you?

A. No.

[fol. 445] Q. Was it ever the policy of the White Plains Reporter to cover the news of all Westchester County thoroughly?

A. No.

Q. I mean, you were not very much interested in the news that happened from day to day in Yonkers?

A. No.

Q. And other parts or some other parts in the county?

A. No.

Q. And when the County News Service was in existence there was a great deal of news that came over the ticker that you did not use, was there not?

A. Yes.

Q. Is it not true, Mr. Hogan, on any news service more is thrown away than goes in your newspaper?

A. Usually, I will say that is true.

Mr. Hanson: I think that is all, your Honor.

Recross-examination.

By Mr. Roach:

Q. Mr. Hanson asked you about Lindbergh which was long before the period—

The Court: Wait a minute. Let us not go back to Lindbergh.

Q. Let us take the period involved when France gave up. Did you run a special on that?

A. Yes.

Q. You ran a special edition?

A. Yes.

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[fol. 446] KENNETH OLSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hanson:

Q. Will you tell us where you reside, Mr. Olson?

A. 789 Vernon Avenue, Glencoe, Illinois.

Mr. Roach: Where?

The Witness: Glencoe, Illinois.

Q. What is your present business?

A. I am Dean of the Medill School of Journalism.

Q. Have you had any experience in the field of journalism outside of teaching?

A. Yes. I put in many years in the newspaper business.

Q. Will you please outline your experience?

A. Well, I started in while I was still in high school working in a country weekly, setting type; learned to operate a linotype; sweeping out and attending the presses. Later I worked on the Ashland, Wisconsin, Press as a reporter;

then as city editor on the Duluth News Tribune and the Milwaukee Sentinel and Reporter.

After the war I came back from France and went to work on the Milwaukee Journal. I was successively copy reader, night editor, telegraph editor, make-up editor, assistant Sunday editor and promotion editor.

[fol. 447] Then I went to the Capitol Times at Madison, Wisconsin, the State Capitol, and was managing editor of the Capitol Times, a daily there.

After that I was in financial advertising for a number of years, first as new business and advertising manager of the Commercial National Bank and Union Trust Company, and then had my own financial advertising agency which handled the advertising of some 40 different banks and trust companies and investment houses.

Then in 1930, I think it was, I moved to Minneapolis and became associated with the Northwest Daily Press Association, as market counsellor.

During that period, from 1930 to 1935, I was also an editorial contributor to the Minneapolis Star.

In 1935 I moved to New Jersey as manager of the New Jersey State Press Association.

Then in 1937 I moved to Northwestern. That was my last newspaper work in 1937.

Q. When you speak of Northwestern, that is where you are now stationed?

A. Yes.

Q. As Professor of Journalism?

A. Dean of the School of Journalism, that is right.

Q. While you were in New Jersey did you do any teaching?

A. Yes, I was also the director of the School of Journalism in Rutgers University.

Q. As director of the School of Journalism at Rutgers and as Dean of the School of Journalism at Northwestern, do you attempt to familiarize yourself with what is going on in the newspaper business throughout the country currently?

A. You must or you cannot run a school of journalism.

[fol. 448] Q. You would also say then that you are rather familiar with the business of publishing newspapers in the United States, would you?

A. I have to be.

Q. What is it?

A. What is what?

Q. What is the newspaper publishing business? Let us find that out?

A. A newspaper business is one designed to provide—

Mr. Roach: This may be all very interesting, but I wonder if I could learn the purpose of it.

The Court: It is laying a foundation for expert testimony, I gather.

Mr. Hanson: I think so.

The Witness: May we go back to the very beginning, then, to explain that—

The Court: Do not go too far back.

The Witness: I think it is essential to make my point.

The Court: All right.

The Witness: When our founding fathers set up their new experiment in government here they knew they were surrounded with a world that was ruled by autocracy.

The Court: I do not think we ought to go into all of this.

Mr. Roach: I object to that, too.

Q. All right, Professor. Just go on and say just what is the purpose of publishing a newspaper.

A. Providing information so that your citizens can know what is going on in their local, state and national governments and proceed to exercise their rights as citizens at the polls on the basis of that information.

[fol. 449] Q. How are newspapers published, or what is the basis for the issue?

A. Well, we have weeklies. We have semi-weeklies. We have tri-weeklies. We have dailies. We have some papers that are published on Sundays only.

Q. Does the function of those publications differ in any material respect?

A. Not at all.

Q. The the only difference between them, would you say, is one of frequency of issue?

A. That is right.

Q. Some daily newspapers have more issues than others?

A. Yes, sir.

Q. How is the information which the newspaper publishes generally classified within the business itself?

A. Well, we have news. We have editorial matter. We have feature matter and we have advertising matter.

Q. Does the newspaper as a rule employ a large staff of people?

A. Why, that depends upon the size of the paper.

Q. Assume that you have a paper that had a circulation of from 8,000 to 11,000, would you say that a news staff of 13 to 16 persons was the average size?

A. From 8,000 to 10,000?

Q. To 11,000.

A. Eight thousand to 11,000, 13 to 16 people?

Q. Yes.

A. That would be larger than the average.

Q. That would be larger than the average?

A. Yes.

Q. Where does the newspaper get its revenues, if you know?

A. Circulation, advertising and miscellaneous.

Q. What do you mean by miscellaneous?

A. On most daily papers that amounts to only a fraction [fol. 450] of 1 per cent, maybe of waste paper and other things, but the bulk of your income, of course, comes from advertising. In normal times about from two-thirds to three-fourths comes from advertising, and only one-fourth to one-third from circulation.

Q. On advertising revenues in turn, could you say how they might be distributed?

A. Well, local advertising usually accounts for approximately 75 per cent of your total advertising income.

National advertising in the last few years has yielded probably only 13 to 15 per cent. The remainder itself would come from classified and legal.

Q. Legal advertising is that form of advertising public notices which are required?

A. Yes.

Q. Such as notice of wills and so on and so forth?

A. Yes.

Q. Do you have any occasion to study the nature of the circulation of newspapers?

A. Yes, we do that right along.

Q. How is it distributed, I mean, generally speaking, with reference to the place of publication?

A. Most of our papers are local papers. They have to be. Our country is so big we cannot cover great areas, and our circulation is usually limited to the city and the trade area around it.

By "trade areas" we mean the towns and rural areas in the section from which people normally come to our city as a trade center.

Q. Did you make a study of the circulation in 1941, at my request?

A. Yes, I did.

Q. Do you recall, Mr. Olson, how many daily newspapers there were, roughly speaking, in that year that you made that study?

[fol. 451] A. In 1941 there were approximately 2,000 dailies in the country.

Q. Could you say about what percentage of the circulation of those 2,000 was distributed entirely within the state of publication?

A. I will say about 90 per cent entirely within the state of publication.

Mr. Hanson: If your Honor please, at this point I have here a government document entitled: "A Study of Small Daily Newspapers" which was prepared by the Wage and Hours Division of the United States Department of Labor. On page 4 there is an analysis of newspaper circulation, and on page 5 there is a table dealing with the number of newspapers in the United States, type and size of circulation; and on page 80, in the appendix table No. 2, on page 80, there is a table of circulation of daily newspapers by the size of the city.

I would like to have the marked portion of page 4 and the table on page 5 and the table on page 80 introduced in evidence at this time, and I offer it. Mr. Roach has seen it before. It was attached to some of the pleadings in the earlier stages of the case.

Mr. Roach: We object to that. It is not an interpretive bulletin.

Mr. Hanson: No, no. It is just a factual study that was made for a purpose, but these are facts that are unquestioned, your Honor, about distribution and circulation.

The Court: Let me see it. Is this in the form in which [fol. 452] it is given out by the United States Department of Labor?

Mr. Hanson: I obtained it from the United States Department of Labor.

The Court: Objection overruled. I will take it subject to your offer in evidence of any other part of it that you may want.

Mr. Roach: Thank you.

(Pages from Department of Labor Bulletin received in evidence and marked Defendant's Exhibit A.)

Q. Can you discuss the nature of the services that newspapers render, as you have studied them?

A. Well, the first obligation is to present such news as the editor feels is significant relating to the news of the local community, the state, the nation and the world; not only governmental matters but social and economic matters which may affect the lives of the citizens of the community.

It must then also, of course, through its editorial columns interpret the significance and meaning of these events.

Every newspaper supplies also a certain amount of entertainment matter, and a big part of its responsibility is to supply also the news of the business of that community through the advertising columns and people, particularly the women, in our communities are as much interested in the store news which appear in our advertisements as they are in the news that appear in the news columns.

Q. How would you describe the work that is performed, for instance, by those who gather, write and edit the news on a newspaper?

A. I am not sure that I understand what you mean.

[fols. 453-466] Q. Would you say that they are engaged in professional work or engaged in trade or engaged in a craft?

A. Most certainly in a professional sense.

Mr. Roach: We object to that, if your Honor please.

The Court: I do not believe that is a subject of expert testimony. What this man may think I do not know. That is, if he knows any more about a professional man than a Court, I do not know.

Q. All right. Right on that point: You testified, did you not, that you were the Dean of the School of Journalism of Northwestern University?

A. That is right, yes.

Q. Is that correct?

A. Yes.

Q. How many schools of journalism are there in the United States, Mr. Olson?

A. There are 33 accredited schools.

Q. What do you mean by "accredited schools"?

A. They are accredited by the National Council on Professional Education in Journalism as being professional schools.

Q. Do they require college degrees as a prerequisite to admission or not?

A. Some of them do. Most of them, like law schools and medical schools, require two or three years of college work for admission.

Q. How many other colleges and universities, outside of these accredited schools, teach them, if you know?

A. There are approximately 500 others that offer some work in journalism.

Q. Do you know whether any of the college groups or any state groups or any governmental groups have treated journalism as a profession?

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[fol. 467] Cross-examination (continued).

By Mr. Roach:

Q. Have you submitted any brief in any court case recently?

A. None recently.

Q. No court case?

A. No.

Mr. Hanson: I thought you were through?

Mr. Roach: Do you mind if I ask you another question?

The Court: I guess he was through until I asked a question..

Q. Are you familiar with the lawsuit brought by the United States of America against the Associated Press?

Mr. Hanson: I object to it. That does not have anything to do with this case.

The Court: I do not see how it has.

Q. Are you familiar with the contention of the answer of the Associated Press in that case?

Mr. Hanson: I object to that question.

The Court: I do not believe that is material.

Q. Do you agree with this statement contained in the answer of the Associated Press in this case—

Mr. Hanson: I object to that.

The Court: I will let him ask it, but I do not see that it is material.

Mr. Roach: He was asking questions, and this is with respect to the first part of the direct examination.

Q. (Continuing:) —that newspapers supply a necessity and that their business affects the national interest and [fol. 468] public opinion is affected by the extent to which current, accurate and complete information of events and conditions throughout the world is made available; that the extent of such information has increased with the growth and number, range and complicity of public issues, and that the dissemination among the American people of frequent, accurate and world-wide news of current events and conditions through the instrumentality of newspapers is of vital importance to the national welfare?

Mr. Hanson: I object.

The Court: I think he has been telling us that is so, has he not?

A. I certainly agree.

Q. You do agree with that?

Mr. Hanson: Before he answers, I want to object, because the Associated Press case is a highly controversial issue.

The Court: He is not bringing in that case. He is simply asking—

Mr. Hanson: If he agrees.

The Court: He is making a general statement and asking whether he agrees with it or not.

Mr. Hanson: No, he is asking whether he agrees with that particular phrase in the Associated Press's answer to a bill of complaint filed by the Department of Justice.

The Court: What is the difference where it comes from?

Mr. Hanson: Not a bit.

The Court: We are going to take a short recess.

(Short recess.)

[fol. 469] The Court: Do you rest?

Mr. Hanson: Yes, I have rested.

The Court: Do you rest, Mr. Roach?

Mr. Roach: Yes, your Honor.

(Witness excused.)

Mr. Roach: I will just offer in evidence the rest of this Exhibit A so that it is now in evidence in full.

The Court: It cannot do any harm that way, I suppose.

Mr. Hanson: No, indeed, your Honor.

The Court: Are you through, Mr. Roach?

Mr. Roach: We rest.

The Court: Do you want to make any oral argument now or do you want to file a brief?

Mr. Hanson: I want to renew the motions which I have made earlier which your Honor both denied and took under advisement.

The Court: I will reserve decision on those.

Mr. Hanson: All right. I would like to file a brief in this case because the issues are tremendously important, and I presume that it would be the plaintiffs' obligation to file a brief, and the defendant to file a brief in reply. Is that correct, under your procedure?

The Court: That is the way it is generally done here.

Mr. Hanson: I have inquired of the official reporter, and he said it will be probably 10 days before the record will be prepared.

By that time I shall be in California. I shall come back about the 15th of March to my office; so I assume that after the 15th of March the plaintiffs' brief will be served on me and you will allow whatever time I want and I will file a reply brief, your Honor.

The Court: My situation is that I have no schedule for next month, but undoubtedly I will have to sit during the [fol. 470] next months, so that I will have a great deal of time next month. I would like to have it come in during March, because after that I will be engaged for every month up until July.

Mr. Hanson: Assuming that such brief as plaintiffs desire to file is in my hands around the 15th of March—we do not have to have the briefs printed, do we?

The Court: No.

Mr. Hanson: If I had one week I could have my brief in your Honor's hands by the 22nd of March.

The Court: Mr. Roach filed a very comprehensive series of trial briefs, so I would gather that there is not a great deal more that you would want to file.

Mr. Roach: That is right, your Honor.

The Court: You could take that brief and supplement it as you like and serve it on Mr. Hanson, and he will have it before the 15th of March. Then you want how long, Mr. Hanson?

Mr. Hanson: I will want one week, because I will arrive in Washington on the morning of the 15th on my return from California, and I could have it in your Honor's chambers by the 22nd of March.

The Court: That would be very fine.

Mr. Hanson: Shall I send it to this court or Buffalo?

The Court: Send it to Buffalo. I will be there at that time.

I think you had better make a motion on the record for judgment on the pleadings.

Mr. Roach: Yes, your Honor. The plaintiffs move for judgment on the pleadings in favor of each plaintiff.

[fols. 471-531] The Court: I will reserve decision on your motion and I will reserve decision on Mr. Hanson's motions, with the understanding that these papers will be filed. I understand Mr. Roach has to file some memoranda here as to the amounts that are claimed.

Mr. Roach: In regard to the hours that are involved in the exhibits.

The Court: Suppose we leave it this way: When you file your brief with him you specify then exactly what you claim as to each item, for each one of the plaintiffs, and also how much you ask in your prayer for relief for each one of the plaintiffs, and then that will be definite. I would suggest that you do it before the 15th of March, so send your brief to him. Suppose you take about two weeks and send it to him, and also send it to me in Buffalo, and I will receive yours, Mr. Hanson, within a week after the 15th of March.

Mr. Hanson: That is right, your Honor.

The Court: I hope that I will be free so that I can devote my time to it.

[fol. 531a]

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PLAINTIFFS' EXHIBIT No. 15

AGREEMENT

Made this 27th day of March 1939, at New York, N. Y., between King Features Syndicate, Inc., a New York corporation, International News Service Department, hereinafter referred to as International News Service and White Plains Publishing Company, Inc., the owner and publisher of the newspaper hereinafter named, hereinafter called the Publisher.

Witnesseth: That for and in consideration of the sum of one Dollar (\$1.00) by each to the other in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto have agreed:

First: International News Service hereby bargains and sells to the Publisher the right and privilege of publishing in the The Daily Reporter a newspaper printed in the English language at White Plains, N. Y., its report as hereinafter described to wit:

Leased wire printer report, daily except Sunday and agrees as far as practicable to deliver to the Publisher such news report.

Said above described report shall be filed to the Publisher at New York, N. Y., or elsewhere if International News Service so elects.

Second: The Publisher agrees to provide at his expense any necessary quarters for the wire and printer-telegraph machines or other equipment, and to defray the cost of any necessary wire, installation and power current required for the operation of printer-telegraph machines or other equipment, and agrees to receive and accept said news report and to pay therefor without deduction to International News Service, at its New York office, during the term of this agreement and any extensions thereof, the sum of Fifty Dollars (\$50.00) per week for the 1st year; Fifty-one Dollars per week the 2nd year; Fifty-two Dollars (\$52.00) per week the 3rd year; Fifty-three Dollars (\$53.00) per week for the 4th year; Fifty-Four Dollars (\$54.00) per week the 5th year and thereafter, weekly in advance, Provided (1) that International News Service shall not be required

to furnish such Report on Sundays or later than twelve o'clock noon on Christmas Day, or the Fourth of July. (2) that if the telephone or telegraph companies to which tolls are paid on behalf of the Publisher by International News Service raise the tolls on said news report, or increase the rental rate on printer-telegraph machines or other equipment supplied by them; or in case of an increase in the remuneration of telegraph operators by a general revision of wage contracts, said Publisher shall also pay the increases in such tolls, rental or wages to International News Service. (3) that in case of a war or any other extraordinary event requiring an additional or extraordinary expenditure of \$500.00 or more weekly by International News Service in securing and delivering the news of same, International News Service may assess and the Publisher shall pay International News Service an additional weekly sum not to exceed 25% of the Publisher's regular weekly payments, for a period co-incident with said extraordinary expenditure by International News Service. (4) that if said news Report or any wire or other facilities used in the transmission thereof shall be hereafter made subject to any Federal, State or Municipal tax of any kind payable either directly or indirectly by International News Service, the Publisher shall reimburse International News Service for the proportion thereof; as determined by International News Service, properly applicable to said news Report.

Third: The Publisher agrees not to furnish, or permit to be furnished, by its employees or from its office any portion of the International News Service report or any news tips therefrom to any other person, corporation, publication or publisher, or make any other use thereof than in the above-mentioned newspaper, without the written consent of International News Service, and further agrees to respect all release pledges on advance matter and to carry copyright lines on all copyrighted matter, and to carry the International News Service credit line wherever it appears in the service copy.

Fourth: The Publisher agrees to furnish to International News Service at the office of the Publisher for publication and/or distribution all local news and special service from tributary news territory collected by the Publisher, without cost to International News Service.

Fifth: The Publisher agrees to turn on the printer-telegraph machine promptly each day that service is furnished and to protect from ill usage the printer-telegraph machines or other equipment installed for the delivery of this report in its premises and to be responsible for any damage thereto due to its own acts or its own negligence or that of any of its employees. The Publisher further agrees to pay any expense incurred in connection with the transfer or relocation of any equipment after the original installation thereof.

Sixth: It is mutually agreed that International News Service reserves the right to make working arrangements and exchanges of news and wire facilities with other press associations, publishers or persons and to sell said news report to any other party or parties.

Seventh: It is further mutually agreed that International News Service, shall, in no event, be liable to the Publisher for any loss, injury, or damage that the Publisher may sustain, or be compelled to pay by reason of the publication of any matter furnished to the Publisher by International News Service.

Eighth: This agreement is made subject to the ability of wire companies to furnish the necessary facilities and the continuance of intermediate clients now on the circuit unless International News Service is satisfied with the rate named in this agreement, or same can be mutually readjusted.

Ninth: This agreement shall continue for five years from March 27th, 1939 and shall thereafter renew itself continuously for periods of five years unless either party shall notify the other by registered letter received at least sixty days before the beginning of the first renewal period or any subsequent renewal periods, of its desire to terminate this agreement, in which event this agreement shall terminate at the beginning of the next renewal period which would have commenced thereafter; otherwise it shall remain in full force and effect, subject to all terms and conditions hereof. In the event of a sale, transfer or consolidation of the aforesaid newspaper property of the Publisher, the Publisher hereby guarantees that his successors or assignees will fulfill the terms and conditions herein contained for the full term of this agreement or any extensions thereof.

Tenth: Should the Publisher fail to make the weekly payments hereinabove provided to be paid, the International News Service shall have the right to discontinue its service to the Publisher without notice, but such discontinuance shall not be construed to be a surrender of any of its legal or equitable rights hereunder. The failure of International News Service to exercise the said right in any instance, however, shall not be construed as a waiver of its right to do so in the case of any subsequent default by the Publisher in making the said weekly payments.

Eleventh: It is expressly understood and agreed that this contract is not binding upon International News Service unless signed by a corporate officer of International News Service, and that it contains all of the agreements between the parties hereto and that there are no oral, collateral or other agreements which are not herein set forth.

This agreement supersedes the one dated Feb. 1, 1939 between the parties hereto.

(Signed) King Features Syndicate, Inc. International News Service Department, by Ward Greene; Publisher, White Plains Publishing Company, Inc., by W. Lee Tuller, Pres.

Witness: As to the King Features Syndicate, Inc., International News Service Department, (Signed) by Walter E. Moss: As to Publisher, ———.

[fol. 532] DEFENDANT'S EXHIBIT A

Bulletin from Department of Labor

(Omitted pursuant to stipulation.)

[fol. 533] IN SUPREME COURT OF NEW YORK, WESTCHESTER COUNTY

OPINION BY HINCKLEY, J.

Mabee v. White Plains Pub. Co., Inc.—This action was tried at a regular term of the court held in White Plains, Westchester County, New York, a jury having been waived.

Plaintiffs sue as individuals under the Fair Labor Standards Act of 1938, claiming compensation for overtime beyond the regular work week. There were originally three additional plaintiffs who for various reasons were unable to be present and their claims were not litigated. Although joined as plaintiffs no one individual had any financial interest in the recovery of any other. The Court of its own motion severed the action. The causes of action of the three plaintiffs who had not appeared personally were united in one action and the trial thereof stayed (Soldiers & Sailors Civil Relief Act, sec. 201; Military Law of New York State, sec. 304; Civil Practice Act, sec. 96). Trial of the causes of action of the above entitled six plaintiffs was had.

Prior to the trial the defendant had moved before Mr. Justice Witschief to dismiss the complaint. The questions raised upon that motion were decided in accordance with the statute and authoritative precedents. The Court at this time reaffirms the decision of Mr. Justice Witschief to the full extent thereof. Sustained by credible evidence adduced upon the trial the following objections raised upon the motion to dismiss and upon the trial are overruled. Daily newspapers such as that published by defendant are subject to the Fair Labor Standards Act of 1938, and the provisions of the act are not violative of Article I, Section 8 of the United States Constitution, nor the first or [fol. 534] fifth amendments thereof (*Fleming, adm'r, &c., v. Lowell Sun Co.*, 36 Fed. Sup. 320, reversed on another ground, 120 Fed. [2d], 213, 315 U. S., 784; *A. H. Belo Corporation v. Street*, 36 Fed. Sup., 907; 121 Fed. [2d], 207; 316 U. S. 624; *Walling v. Sun Publishing Co.*, 47 Fed. Sup. 180). The Associated Press is engaged in interstate commerce (*Associated Press v. N. L. R. B.*, 301 U. S. 103). The Fair Labor Standards Act of 1938 is not unreasonable nor arbitrary because it exempts certain weekly newspapers from its application (*Fleming, adm'r, &c., v. Lowell Sun Co.*, *supra*; *Walling v. Sun Publishing Co.*, *supra*). The decision of the motion to dismiss the complaint specifically left to the Trial Court the determination of the question as to whether the activities of the plaintiffs related to interstate commerce. Evidence upon the trial established that each of the plaintiffs was employed in producing and working on such goods in a process and

occupation necessary to the production thereof (F. L. S. A. of 1938, sec. 3 [j]; Interpretive Bulletin No. 1 [5]).

The plaintiffs were all employees of the defendant acting in various capacities in the publication at White Plains, New York, of a daily newspaper, known as "The Daily Reporter." In the composing room of defendant's plant time clocks were installed and accurate records kept of the time spent in service by the employees of that department. However, there were no time clocks installed nor time records kept in the editorial department where plaintiffs were employed. The plaintiffs themselves kept no records of their regular hours nor of their overtime. The Fair Labor Standards Act of 1938, Section 7, prohibited employment over forty-four hours per week for the first [fol. 535] year after the passage of the act; over forty-two hours the second year, and over forty hours the third year and thereafter, *unless* the employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he was employed. The plaintiffs were all employed when the act took effect on October 24, 1938, and were still so employed when the newspaper ceased publication on February 28, 1941. We are therefore concerned with the period between those two dates. Authority is vested in this Court to hear, try and determine the issues herein (F. L. S. A. of 1938, sec. 16 [b]).

Current records being unavailable, plaintiffs produced in court and introduce in evidence the newspaper files for the period last mentioned. Prior to the trial each plaintiff had examined these files and selected the articles therein contained upon which each claimed to have been employed by defendant in addition to the regular work week hours. Each plaintiff testified in each instance to the minimum length of overtime required and actually spent by him in procuring the data and composing the selected articles. For convenience at the trial this testimony was presented in the form of typewritten schedules, the correctness of which was respectively attested to by the sworn testimony of the various plaintiffs. No direct evidence was offered by defendant to prove that the articles were not written by the respective plaintiffs as claimed, nor that the respective plaintiffs did not work overtime, nor that the minimum hours as claimed were not required or spent. The defendant objected to this testimony, claiming that it was

[fol. 536] not definite or accurate, or of sufficient probative value to be admissible. Defendant cannot be heard to complain for its own admitted neglect or refusal to obey the statute and make, keep and preserve accurate records of the wages and hours of plaintiffs (F. L. S. A. of 1938, Sec. 11 [c] and 15 [a] [5]). From the testimony upon the trial it is apparent that the method adopted by plaintiffs is the only manner by which they could attempt to establish their overtime. The period of claimed overtime covers many months and no one could without refreshments of recollection swear to the exact details of his work. There is no superior evidence available or procurable. We are not concerned with the rule of best and secondary evidence, as that relates entirely to documentary evidence (*Carroll v. Gimbel Bros.*, 195 A. D., at 451; C. J. S., Sec. 782, page 707). " 'All evidence,' said Lord Mansfield in *Blatch v. Archer*, 1 Cowper 63, 65, 'is to be weighed according to the proof, which it was in the power of one side to have produced and in the power of the other side to have contradicted' " (*Matter of Jordan v. Decorative Co.*, 230 N. Y., at 526; *Travelers-Ins. Co. v. Pomerantz*, 246 N. Y., at 69). The Courts have gone so far as to say that evidence of facts which are necessarily indefinite and which cannot be proved with even an approach to accuracy, is admissible. Provided that no better evidence is available, more cannot be required (*Houghkirk v. President, &c., D. & H. C. Co.*, 92 N. Y., at 225). The duty devolves upon the Court to give or to deny credence to the testimony of the plaintiffs. True, the major portion of news items, editorials and special articles is gathered and written [fol. 537] during the daylight working hours, but major and minor events which go to make up news are not in the habit of punching a time clock or showing due respect for the statutory minimum hours of a work week. News may break at any hour of the day or night, flare up, and in twenty-four hours be cold and uninteresting. The news gathering staff of a wide-awake daily newspaper must be prepared not only to report scheduled events occurring during the regular working hours, but also to stand by and work overtime in order that there may be a coherent uninterrupted record of each day's happenings. Meetings, social functions, entertainments, wartime communiques, and fireside chats, frequently occur in the evening. Weighed in the scales of common experience there is nothing unrea-

sonable in the claim of overtime by one engaged in the gathering, assembling or creating the varied items which go to make up a daily newspaper. In the absence of substantial or detailed contradictory evidence the Court must and does find by a fair preponderance of the believable evidence that the plaintiffs did perform services for the defendant beyond the prescribed hours of designated work weeks and that the minimum overtime hours as claimed were actually spent in the course of their employment.

Defendant contends that the Fair Labor Standards Act of 1938 does not apply to any of these plaintiffs for the reason that every one of them was employed in a bona fide executive, administrative or professional capacity and all come within the exceptions set forth under Section 13 of the Act. That section reads as follows: "Sec. 13. (a) The [fol. 538] provisions of sections 6 and 7 (prescribing the minimum and maximum wages and hours) shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)." The regulations of the administrator (Title 29, Chap. 5, Code of Federal Regulations, Part 541) which define and delimit those terms are too extensive to be quoted herein. So far as they concern an employee employed in a bona fide executive capacity or in an administrative capacity or in a professional capacity, they are separately stated. Each separate definition and delimitation consists of a series of qualifications under alphabetical and numerical headings. Therein the administrator has been meticulous in the use of the conjunctive "and" and the disjunctive "or." For an employee, as defined and delimited by the administrator, is employed in a bona fide executive capacity only when he qualifies under A, B, C, D, E and F of Section 541.1; in a bona fide administrative capacity only when he qualifies under A and also under any one of the subdivisions of B numbered (1), (2), (3) or (4) of Section 541.2 as amended; and in a bona fide professional capacity only when he qualifies under subdivisions A-1, 2, 3, 4 and either 5(a) or 5(b) and B of Section 541.3. The limitations of this opinion prohibit a detailed description of the duties of each plaintiff in relation to such regulations of the administrator. Suffice it to say that no one of the plaintiffs performed services which

[fol. 539] bring him within the definition or delimitation of executive, administrative or professional as defined and delimited by the regulations of the administrator. This finding is consistent with the Interpretive Bulletins of the Wage and Hour Division of the United States Department of Labor. These bulletins while not issued as regulations under statutory authority do carry weight and persuasiveness as an expression of the view of those experienced in the administration of the act (*United States v. American Trucking Associations*, 310 U. S., at 549).

The interesting question arises as to how plaintiffs are entitled to compute their overtime. Section 7(a) of the Fair Labor Standards Act of 1938 provides as follows: "No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce (1) for a workweek longer than forty-four hours during the first year from the effective date of this section, (2) for a workweek longer than forty-two hours during the second year from such date, or (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The law is clearly established that in the absence of contract or definite arrangement the "regular rate at which he [an employee] is employed" is determined by dividing his weekly salary by the actual hours worked each week. Each week that he worked beyond the statutory prohibition [fol. 540] would entitle him to extra compensation for each hour of overtime each week computed at one and one-half times such regular rate at which he was employed (*Overnight Motor Transp. Co., Inc., v. Missel*, 316 U. S. 572, approving this method as used in *Warren-Bradshaw Drilling Co. v. Hall, et al.*, 124 Fed. 2d 42 and other cases in lower court and as employed by the Administrator (Interpretive Bulletin No. 4 [9]; *Walling, adm'r v. Belo Corp'n*, 316 U. S. 624). In the latter case at page 632 the Court points out that the "regular rate as so fixed is certainly irregular in a mathematical sense, and that it is difficult to say that it is regular in the sense that either employer or employee knows what it is or can plan on the basis of it." Under this system of computation, the longer an employer compels or asks an employee to work, the

lower the rate of pay at which he is employed. A more simple and fairer method, particularly as to the employee, would be to declare that his weekly salary was compensation only for the hours that he legally could work under the statute. Nowhere is this method suggested save as dictum in *Fleming v. A. H. Belo Corp'n*, 121 Fed 2d at page 211).

In the instant case, however, there was a definite standard set up prior to the passage of the Fair Labor Standards Act of 1938. One Walter V. Hogan, vice president and treasurer of the company, and editor of the newspaper, swore that in 1933 when the N. R. A. came into existence the entire newspaper was reorganized on a forty-hour a week basis; the workweek of each employee was definitely [fols. 541-544] forty hours; the basic week of each employee, including the newsman, was forty hours a week, and that basic forty-hour week was in effect at all times since 1933 (Stenographer's Minutes, page 503). Here we have a definite, uncontradicted agreement of employment that each employee's salary shall be for forty hours' employment each week. In other words, each employee was required to commence work at a definite hour each day and work until a specified hour which, in the weekly aggregate would amount to forty hours. True, under that arrangement he might at times work less than forty hours or more than forty hours a week. But by definite hours of employment each day a week, the regular rate of pay could be mathematically measured as though he were paid by the hour. As an illustration, if he received a weekly salary of \$40 his pay amounted to \$1 an hour. The regular rate at which he was employed is clearly arrived at by dividing his weekly salary by the forty hours upon which basis the entire newspaper had been organized for five years. Thus we have in this instance a method by which we can determine the regular rate at which each plaintiff was employed and by this method the regular rate of each employee must be computed. The employee's overtime commenced after he had worked beyond the statutory forty-four, forty-two, or forty hours prescribed by statute in the respective years.

Judgment may be entered in favor of plaintiffs in accordance with this opinion for unpaid overtime computed as herein indicated at the rate of one and one-half times the

regular rate at which each plaintiff was respectively employed, and an additional equal amount as liquidated damages and attorneys' fees (F. L. S. A. of 1938, Sec. 16[b]).

[fol. 544a] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

Present: Hon. William F. Hagarty, Acting Presiding Justice; Hon. John B. Johnston, Hon. Frank F. Adel, Hon. George H. Taylor, Jr., Hon. Harry E. Lewis, Justices.

COURTNEY, M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, Norton Mockridge, George S. Trow and William L. O'Donovan, Respondents,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC., Appellant

ORDER OF REVERSAL—Dec. 29, 1943

The above named White Plains Publishing Company, Inc., the defendant in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Westchester on the 2nd day of June, 1943, in favor of plaintiffs and against defendant, herein, and the said appeal having been argued by Mr. Elisha Hanson of Counsel for appellant, and argued by Mr. Stephen R. J. Roach [fol. 545] of Counsel for respondents, and submitted by Mr. Douglas B. Maggs, Solicitor, United States Department of Labor, as *amicus curiae*, and due deliberation having been had thereon:

It is Ordered and Adjudged that the judgment so appealed from be and the same hereby is unanimously reversed on the law and the facts, with costs, and the complaint dismissed on the law, with costs.

Enter: John J. Callahan, Clerk.

IN SUPREME COURT OF NEW YORK, WESTCHESTER COUNTY

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, Norton Mockridge, George S. Trow and William L. O'Donovan, Plaintiffs,

against

WHITE PLAINS PUBLISHING COMPANY, INC., Defendant

JUDGMENT OF REVERSAL

An appeal having been taken by the above named defendant to the Appellate Division of the Supreme Court in and [fol. 546] for the Second Judicial Department from the judgment of the Supreme Court, Westchester County, entered in the office of the Clerk of the County of Westchester on the 2nd day of June, 1943; and the said appeal having been duly heard and the said Appellate Division having thereupon by its order dated December 29, 1943, duly unanimously adjudged that the said judgment so appealed from be reversed on the law and the facts with costs to the defendant and the complaint dismissed on the law with costs to the defendant and the remittitur and record on appeal together with a certified copy of said order of reversal having been duly filed in the office of the Clerk of the County of Westchester on the 10th day of January, 1944, and the costs of the appeal having been duly taxed by the Clerk in the sum of \$1,146.95.

Now on motion of Frances K. Marlatt, attorney for said defendant, it is hereby

Ordered, that the said order of reversal of the Appellate Division dated December 29, 1943, be and the same hereby is made the order of this Court and it is further—

Ordered and Adjudged, that the said judgment of this Court herein dated June 2, 1943, and entered in the office of the Clerk of the County of Westchester on the same day be and the same is hereby reversed upon the law and the facts with costs to the defendant and against the plaintiffs, and it is further

[fol. 547] Ordered and Adjudged, that the complaint herein be and the same hereby is dismissed on the law with costs to the said defendant and against the said plaintiffs, and it is further

Ordered and Adjudged, that the defendant recover from the plaintiffs, and each of them, the sum of \$1,146.95, costs as taxed and that the defendant have execution therefor.

Judgment entered this 10th day of January, 1944.

Robert J. Field, Clerk.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Same Title]

OPINION

JOHNSTON, J.:

This action was instituted under section 16 (b) of the Fair Labor Standards Act of 1938 (Chap. 676, 52 Stat. 1060; U. S. C., tit. 29 § 201, *et seq.*) to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and an attorney's fee. From a judgment in favor of plaintiffs defendant appeals. The Act applies to all employees engaged in commerce or in the production of goods for commerce, and so far as pertinent, provides:

"Sec. 3. As used in this act * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof. * * *

[fol. 548] "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

The principal question presented is: Does the Act apply to appellant, and were its employees—respondents herein—engaged “in any process or occupation necessary to the production” of goods in interstate commerce within the meaning of section 3 (j) of the Act?

Appellant is a domestic corporation and at the times mentioned in the complaint published a newspaper known as “The Daily Reporter” at White Plains, New York. Respondents were employees of appellant during the period in controversy or portions thereof, namely, from October 24, 1938, when the Act became effective, until February 28, 1941, when publication of the newspaper was suspended. [fo' 549] O'Donovan was city editor and at times acted as editor; Mabee was assistant editor and subsequently sports editor. The other respondents were reporters.

Appellant contends that the application of the Act to the newspaper publishing business constitutes an abridgment of freedom of speech and the press, in violation of the First Amendment. Appellant also contends that the application of the Act to its business constitutes an unreasonable, arbitrary and injurious discrimination against it, in violation of its rights under the due process clause of the Fifth Amendment, in that the Act does not apply to all citizens equally because it exempts certain newspapers. More particularly, the Act provides that it shall not apply with respect to “any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand, the major part of which circulation is within the county where printed and published; * * *.” (§ 13 [a], [8].) The court held there was no merit to either contention. While the Supreme Court has sustained the constitutionality of the Act (*United States v. Darby*, 312 U. S. 100, and *Opp Cotton Mills v. Administrator*, 312 U. S. 126), it has not considered the precise questions now posed. Nor is it necessary for us to pass upon these questions because this judgment must be reversed for the reason that appellant and respondents' were not engaged in commerce within the meaning of the Act, and Congress never intended it to apply to the situation disclosed by this record.

[fol. 550] It is uncontradicted that the circulation of appellant's newspaper during the period involved in this suit varied between 9,500 and 11,000; that its purpose was to serve the people of White Plains and the neighboring

communities—but not throughout Westchester County—and that its subscribers resided in those areas. It also clearly appears that appellant had no desire and made no effort to secure “out-of-state” circulation, although during the summer its newspaper was mailed to subscribers who were temporarily out of the State on vacation or absent from the State while at school or in the armed forces. It is undisputed that at no time were there more than forty-five copies sent out of the state.

The conclusion is irresistible that appellant was engaged in a strictly local as distinguished from a national activity, i. e., the local business of publishing a local newspaper. It did not produce goods for commerce within the meaning of the Act and, consequently, plaintiffs were not engaged in any process or occupation necessary to the production thereof.

We are urged to hold that because Congress has not expressly excluded commerce of small volume from the operation of the statute, it applies to all newspapers except those which specifically come within the exemption heretofore set out. But it still remains for the courts—“Examining the Act in the light of its purpose and of the circumstances in which it must be applied”—to say whether Congress intended to exclude local newspapers having an in-[fol. 551] significant out-of-State circulation. (Labor Board v. Fainblatt, 306 U. S. 601 607.)

We recognize that the Supreme Court has held that “the power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.” (Labor Board v. Fainblatt, *supra*.) Nor are we unmindful that the Supreme Court has stated that under the Fair Labor Standards Act Congress “has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer.” (United States v. Darby, *supra*.) But no case is cited—and independent search has disclosed none—where the Supreme Court has held that the Act applies where only an insignificant and inconsequential part of an employer’s product is transported from one State to another. The Supreme Court, however, has recently stated that “Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.” (Walling v. Jacksonville Paper Co., 317 U. S. 564, 570.)

Respondents rely on *Schmidt v. Peoples Telephone Union of Maryville, Mo.* (138 F. 2d. 13). There the Circuit Court of Appeals (Eighth Circuit) held that employees, whose duty it was to handle interstate communications, were entitled to recover under the Act even though only one-sixth of the company's income was derived from interstate calls. [fol. 552] But the "Act's coverage depends on the special facts pertaining to the particular business." (*Walling v. Jacksonville Paper Co., supra*, p. 572). Therefore, the *Schmidt* case (*supra*); if pertinent, is not helpful and may also be readily distinguished. There the defendant, a voluntary association maintaining a telephone service primarily for its members, offered a continuous service to and from six towns in an adjoining State. It admittedly was directly engaged in interstate commerce, which the court emphasized was part of the company's regular business and not "some inconsequential incident" of interstate commerce. There the defendant held itself out as furnishing interstate communication service both to its subscribers and the general public and solicited it. Here the sale of its newspaper outside the State was not a regular part of appellant's business but only an inconsequential incident, resulting from appellant's desire to serve the convenience of a few of its subscribers sojourning out of the State.

Respondents also rely on National Labor Relations Board *v. J. G. Boswell Co., et al.* (136 F. 2d 585), where the Circuit Court of Appeals (Ninth Circuit) held that the defendant Corcoran Telephone Exchange was an instrumentality of interstate commerce within the meaning of the National Labor Relations Act notwithstanding that only 77 of 35,000 toll calls a year went to points outside the State. That case also may be distinguished. There the facilities of a local telephone exchange were an integral part of a vast network of telephone lines which covered the entire nation, and while [fol. 553] those lines were owned by a large number of small telephone companies, such as the Exchange, they were operated as a unified system. In addition, "The Exchange's facilities and lines [were] admittedly available and used for the transmission of interstate messages, both those originating and terminating within the Exchange's system." Hence, the court held the Act applicable even though the interstate business involved but a small part of the entire service rendered by the Exchange.

The Solicitor for the Administrator of the Wage and Hour Division, *amicus curiae*, cites *Muldowney v. Seaberg Elevator Co., Inc.* (39 F. Supp. 275 [E. D. N. Y.]) and quotes from the Interpretative Bulletin in *McKeown v. Southern California Freight Forwarders* (6 Wage Hour Rept. 1016), where, under circumstances unrelated to those in the instant case, the Act was held to apply even though the defendant's interstate business was only a small percentage of its total business. Neither case is relevant because admittedly in each the significant fact was that the interstate business was not casual but regular and an integral part of the every day and every week business, whereas, as heretofore pointed out, appellant's interstate business was not regular but casual; not an integral but only an incidental part of its essentially local business.

The mailing of less than one-half of one per cent of its total circulation to subscribers temporarily out of the State did not change appellant's business from an intra-[fol. 554] state to an interstate enterprise. Nor is it reasonable to conclude that by so doing appellant should have an interstate character given to the remaining more than ninety-nine and one-half per cent of its business. *Zehring v. Brown Materials*, 48 F. Supp. 740 [S. D. Calif.]; *Goldberg v. Worman*, 37 F. Supp. 778 [D. C. Fla.]. In so holding we merely apply the maxim *de minimis non curat lex*, which the Supreme Court recently indicated was the right, if not the duty, of the courts. (*Labor Board v. Fainblatt*, *supra*.) To hold otherwise would attribute to the Congress a purpose which it neither contemplated nor designed.

It is also contended that the Act is applicable to appellant because: (a) it purchased newsprint paper and ink outside New York; (b) it secured certain news features from sources outside New York; (c) it obtained the reports of the Associated Press; and (d) it received some advertising from agencies which placed advertising with newspapers throughout the country. The identical argument, under similar facts, was rejected by the Circuit Court of Appeals (Fourth Circuit) in *Schroepfer v. A. S. Abell Co.*, (138 F. 2d. 111, 114).

It is inconceivable, at least to us, that because appellant purchased, outside New York, materials used in the production of its newspaper, that it is subject to the Act. Obviously, when these supplies were delivered to appellant's plant they arrived at their destination and their interstate

movement ended. Nor do we believe that when appellant [fol. 553] obtained news reports and other matter from sources outside New York and edited and reproduced some of them in its newspaper, that it became subject to the Act. As stated by Judge Parker in the case last cited: "In the case at bar, there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." The transmission of extra state news by appellant to its readers did not involve that "practical continuity of movement" of which the court spoke in *Walling v. Jacksonville Paper Co.* (*supra*). If respondents' reasoning be adopted, then, as stated by Mr. Justice McReynolds in his dissenting opinion in the *Fainblatt* case (*supra*): "the power to regulate interstate commerce brings within the ambit of federal control most if not all activities of the nation;" For instance, a baker in Brooklyn, who purchases his flour from a concern in Minnesota and whose sales are limited to his local neighborhood, would be engaged in interstate commerce and subject to the Act if, at a customer's request, each week he sent a box of cookies to the latter's son at [fol. 556] the training station in Pensacola, Florida. Of course, no such result was intended by Congress.

Nor is the holding in the *Schropefer* case (*supra*) in conflict with *Associated Press v. Labor Board* (301 U. S. 103), upon which the court below in part relied. The Associated Press is not a newspaper but, as Mr. Justice Roberts pointed out: "an instrumentality set up by constituent members [there are 1,350 of them throughout the United States] who are engaged in a commercial business for profit, and as such instrumentality acts as an exchange or clearing house of news as between the respective members, and as a supplier to members, of news gathered through its own domestic and foreign activities." The operations of the Associated Press, unlike appellant's activities, involve "the constant use of channels of interstate and foreign communication." There is nothing in the *Associated Press* case (*supra*) which

is decisive of or even touches the question presented in the case we are now reviewing.

Respondents also rely on *Fleming v. Lowell Sun Co.* (36 F. Supp. 320; reversed on other grounds, 120 F. 2d. 213; and affd. by an equally divided court, 315 U. S. 784). That case, so far as material, is authority only for the proposition that a large newspaper is engaged in interstate commerce. (See *Schroepfer v. A. S. Abell Co.*, *supra*, p. 115.)

In view of our determination that appellant was not engaged in interstate commerce and that respondents were not engaged in any process or occupation necessary to the [fols. 557-558] production of goods in interstate commerce within the meaning of the Act, it is unnecessary to discuss the other questions raised. We observe, however, that the award made to each respondent is excessive in so far as it computes overtime compensation on a regular work week of forty hours rather than forty-four hours during the first year's operation of the Act, and on a regular work week of forty hours rather than forty-two hours during the second year's operation of the Act.

The judgment should be reversed on the law and the facts, with costs, and the complaint dismissed on the law, with costs.

[fol. 559] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 16th day of November in the year of our Lord one thousand nine hundred and forty-four, before the Judges of said Court.

Witness, the Honorable Irving Lehman, Chief Judge, presiding; John Ludden, Clerk.

COURTNEY M. MABEE and others, Appellants,
against

WHITE PLAINS PUBLISHING COMPANY, INC., Respondent

REMITTITUR—November 17, 1944

Be It Remembered, That on the 24th day of May in the year of our Lord one thousand nine hundred and forty-four, Courtney M. Mabee and others, the appellants in

this cause, came here unto the Court of Appeals, by Stephen R. J. Roach, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And White Plains Publishing Company, Inc. the respondent in said cause, afterwards appeared in said Court of Appeals by Frances K. Marlatt, its attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Stephen R. J. Roach, of counsel for the appellants; and by Mr. Elisha Hanson (Washington, D. C.) of counsel for the respondent; brief filed by amicus curiae; and after due deliberation had thereon, did order [fol. 560-564] and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

And afterwards, to wit, on the eighth day of March, 1945, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE, ALBANY

November 17, 1944.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 565] IN COURT OF APPEALS OF NEW YORK

Present Honorable Irving Lehman, Chief Judge, Presiding.

COURTNEY M. MABEE and others, Appellants,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC., Respondent

ORDER AMENDING REMITTITUR—March 8, 1945

A motion for a reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein, papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion for reargument be and the same hereby is denied and the remittitur amended by adding thereto the following:

Upon this appeal there was presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. This Court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

And, the Supreme Court of the State of New York, Westchester County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Raymond J. Cannon, Deputy Clerk. (Seal State of New York Court of Appeals.)

[fol. 566] IN THE SUPREME COURT OF THE UNITED STATES
ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT
OF CERTIORARI

Upon the annexed petition of the petitioners, dated February 9th, 1945, the time for the petitioners to apply for a writ of certiorari to review the judgment or decree of the Courts of the State of New York, which final judgment was entered in the Court of Appeals on November 16th, 1944, be and is hereby, for good cause shown, extended sixty days from the date hereof.

Dated, Washington, D. C., February 12, 1945.

Robert H. Jackson, Associate Justice of the Supreme Court.

[fol. 567] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 21, 1945

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Morton Lexow. File No. 49,605 New York, Court of Appeals. Term No. 57. Courtney M. Mabee, Charles K. Barnum, Edward G. Tompkins, et al., Petitioners vs. White Plains Publishing Company, Inc. Petition for writ of certiorari and exhibit thereto. Filed April 12, 1945. Term No. 57 O. T. 1945.

FILE COPY

Office of the Court, U. S.
FILED
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CHARLES CLAWSON GROPLEY CLERK

IN THE
Supreme Court of the United States

October Term, 1944.

No. 1152. 57

COURTNEY M. MABEE, CHARLES K. BARNUM, ED-
WARD G. TOMPKINS, NORTON MOCKRIDGE,
GEORGE S. TROW and WILLIAM L. O'DONOVAN,
Petitioners,
against

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent.

**Motion to Dispense with Reprinting Record on Certiorari,
Petition for Writ of Certiorari to the Court of Appeals
of the State of New York and Brief in Support of Peti-
tion for Writ of Certiorari.**

✓ MORTON LEXOW,
Attorney for Petitioners,
70 Lafayette Avenue,
Suffern, N. Y.

DAVID H. MOSES,
STEPHEN R. J. ROACH,
On the Brief.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No.

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN,

Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY, Inc.,
Respondent.

**Motion to Dispense With Reprinting Record on
Certiorari.**

State of New York,
County of Rockland, ss:

DAVID H. MOSES, being duly sworn, deposes and says that he is an attorney at law associated with LEXOW & JENKINS of which firm MORTON LEXOW is the attorney of record for the petitioners herein in this Court. That your deponent is also admitted to the bar of this Court. That your deponent has been in charge of this matter since Mr. Morton Lexow was retained as attorney of record to seek review in this Court.

That this is a motion to have the petition for a writ of certiorari heard on a single printed certified copy of the record in the court below and to dispense with the necessity of having the Clerk of this Court reprint the entire record of the court below on this application for certiorari.

4 The reasons why this relief is requested are as follows:

1. Counsel has endeavored through negotiations with counsel for the respondent and with the Clerks of the Court of Appeals and the Appellate Division to obtain sufficient copies of the record to file with this Court and has been advised that no extra copies are obtainable.

2. That the petitioners prevailed in the Trial Court and the respondent, in appealing to the Appellate Division, did not print extra copies of the record.

5 3. When the petitioners appealed to the Court of Appeals of the State of New York from the reversal in the Appellate Division, they obtained from the Court of Appeals permission to have the appeal heard on the few extra copies of the record that were then available and to dispense with reprinting the record.

4. The petitioners are only able to obtain two copies of the record, one of which has been certified and forwarded to this Court, and the other copy is for use of counsel.

6 5. Petitioners have endeavored to obtain from the counsel for the respondent a stipulation omitting unessential and unnecessary portions of the printed record and after making every reasonable effort for that purpose have been unable to obtain such stipulation.

(a) On February 16th, 1945, your deponent wrote to Frances K. Marlatt, attorney for the respondent in the State Courts, as follows:

"Since the review will only involve the question of Interstate Commerce, we inquire whether you will stipulate to omit unnecessary portions of the record."

(b) On February 23rd, 1945, Miss Marlatt wrote your deponent as follows: 7

"My client believes that the entire record is necessary for the determination of any question involved in this case and therefore is unwilling to stipulate that anything be omitted from the record."

(c) Thereafter, your deponent moved in the Court of Appeals to amend the remittitur so as to have that Court state that the cause was disposed of upon the single issue of Interstate Commerce. That motion was granted and on the 8th of March, 1945, the remittitur was amended limiting the issue to the question of Interstate Commerce (Record, p. 547). 8

(d) That pending such motion to the Court of Appeals, Associate Justice Jackson of this Court extended the time of the petitioners to apply for a writ of certiorari sixty days from February 12th, 1945.

(e) That after the amendment of the remittitur by order of the Court of Appeals, petitioners' counsel again wrote counsel for the respondent asking to omit unnecessary portions of the record and on March 21st, 1945, we were advised by counsel for the respondent that:

"The entire testimony of the complaining witnesses, together with their exhibits, as well as the entire testimony of the defense witnesses must be printed." 9

6. On March 29th, 1945, your deponent personally brought the certified copy of the record to the Clerk of this Court for filing and it was examined by the Clerk who advised your deponent that to reprint the record, consisting of over 560 pages, would cost at least Fifteen Hundred (\$1500.00) Dollars and that since the time to file certiorari under the order of Judge Jackson possibly expired on April 13th, 1945, that sufficient time did not remain for the Clerk to print the record in time.

- 10 7. That your deponent inquired of the petitioners and has been advised that they are unable to raise sufficient money to pay for the printing of the record and the other disbursements incidental to this petition for the following reasons:

(a) One of the petitioners; to wit, Courtney M. Mabee is in the armed services and is unable at this time to contribute anything to the cost of this litigation;

(b) The other petitioners are salaried employees and have not sufficient money or property to bear the expense themselves;

- 11 (c) That the petitioners were promised by the Newspaper Guild, who intends to file a brief *amicus curiae* if the petition herein is granted, a contribution to help pay the expenses and, for reasons unknown to the petitioners, at the February meeting of that group, the motion to authorize the expenditure was inadvertently omitted from the calendar and your deponent has been informed that the next meeting at which such matter will be taken up, will occur in the month of May, 1945.

8. That the question involved herein is primarily one of law and that the facts necessary to determine that question can be summarized on a page and that since the entire printed record will be filed with this Court, either
12 counsel can, in the petition and reply, quote such portions of the record as they deem necessary to the issue of Interstate Commerce which is the only issue upon which review is sought and which is the only issue upon which the New York Court of Appeals determined the federal question involved.

9. That the petitioners have made arrangements for the printing of this motion, petition and brief for certiorari and respectfully request that on this proceeding the re-printing of the entire record by the Clerk be dispensed with. If petition for certiorari is granted, counsel will

endeavor again to arrange to have a condensed record printed sufficient to review the question upon which certiorari may be granted. 13

DAVID H. MOSES.

Sworn to before me, this
7th day of April, 1945.

Beatrice Rittendale

Notary Public,

Rockland County, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES, 14

OCTOBER TERM, 1944,

No.

COURTNEY M. MABEE, CHARLES K. BAR-
NUM, EDWARD G. TOMPKINS, NORTON
MOCKRIDGE, GEORGE S. TROW and WILL-
IAM L. O'DONOVAN,

Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY, Inc.,
Respondent. 15

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW
YORK.**

To the Honorable Chief Justice, and the Associate Jus-
tices of the Supreme Court of the United States:

- 16 COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN, by their attorneys, pray that a writ of certiorari issue to review the judgment and order of the Court of Appeals of New York entered in the above case on the 16th of November, 1944, dismissing the complaint against the respondent and affirming the judgment of the Appellate Division of the Supreme Court of New York for the Second Judicial Department which reversed, on the law and on the facts, the judgment of the Trial Term of the Supreme Court, Westchester County, and dismissed the complaint on the law which judgment and order of the Court of Appeals was amended by order entered on the 9th of March, 1945.
- 17

Opinions Below.

The opinion of the Trial Term, Supreme Court, Westchester County, is reported at 180 Misc. 8, 41 N. Y. S. 2d 534 (our p. 535, *et seq.*).

The opinion of the Appellate Division of the Supreme Court for the Second Judicial Department is reported at 267 A. D. 284, 45 N. Y. S. 2d 479 (additional papers, pp. 551-561).

- 18 There is no opinion in the Court of Appeals in affirming the Appellate Division except the memorandum reported at 293 N. Y. 781.

The order of the Court of Appeals amending the remittitur appears in the record at page 547 and is reported in the New York Law Journal, March 10th, 1945, and has not yet been officially reported.

Jurisdictional Statement.

19

The remittitur of the Court of Appeals of New York was entered on the 16th of November, 1944, and amended by order entered on the 9th of March, 1945.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended, by the Act of February 13th, 1925, for the reasons:

1. That the Appellate Division of the Supreme Court and the Court of Appeals of the State of New York have decided a federal question of substance not heretofore determined by this Court;

20

2. That they have decided it in a way not in accord with the applicable decisions of this Court;

3. That the New York Courts expressly considered the question an open one in this Court and one that should be decided by this Court;

4. That the decisions in the United States District Courts are in conflict and some District Courts have suggested that the question should be decided by this Court;

5. That the result of the decisions of the Courts below has been to deny to the petitioners their claim under a federal statute.

21

The Federal Question as Stated by Court of Appeals in the Amendment of Remittitur Is:

"Motion to amend remittitur granted. Return of remittitur requested and when returned it will be amended by adding thereto the following: Upon this appeal there was presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the

meaning of the Fair Labor Standards Act of 1938. This court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938" (Court of Appeals, March 9, 1945).

The federal question was passed upon in the motion to dismiss the complaint, as appears from the opinion of Mr. Justice Witschief, at Special Term, 179 Misc. 832; 38 N. Y. S. 2d 231, is as follows:

"The action is brought to recover overtime compensation under the provisions of the Fair Labor Standards Act of 1938, 29 U. S. C. A., Sec. 201, *et seq.* The defendant published a newspaper at White Plains, N. Y., during the periods mentioned in the complaint and it is alleged in the complaint that the defendant was engaged in interstate commerce and during said periods sent and delivered its newspaper to various parts of the United States and did not confine such delivery to the State of New York. When the defendant discontinued its publication of a newspaper, its total daily circulation was 5,000 of which forty-two copies were sent to points outside of New York State. All of the objections made to the Fair Labor Standards Act of 1938 in regard to its application to the defendant have been overruled in the U. S. District Court for the District of Massachusetts, in *Fleming, Adm'r, etc., v. Lowell Sun Co.*, 36 F. Supp. 320. The Federal Courts have held that newspapers are subject to the Fair Labor Standards Act of 1938. *A. H. Belo Corporation v. Street*, D. C., 36 F. Supp. 907. And the U. S. Supreme Court has held that the Associated Press is engaged in interstate commerce. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 57 S. Ct. 650, 81 L. Ed. 953. That Congress considered the act as applicable to daily newspapers is indicated by the eighth exemption in Section 13 of the act which excludes weekly or

semi-weekly newspapers with a circulation of less than 3,000, the major part of which is in the county where the publication is issued. It is not for this court to consider either the wisdom or the justice of the application of the act to daily newspapers in such localities as White Plains, only a very small portion of whose circulation goes without the state."

25

The Trial Justice passed on the federal question to the same extent as Justice Witschief (41 N. Y. S. 2d 534, p. 537); (180 Misc. 8); (Record, p. 533).

"Prior to the trial the defendant had moved before Mr. Justice Witschief to dismiss the complaint. The questions raised upon that motion were decided in accordance with the statute and authoritative precedents. The court at this time reaffirms the decision of Mr. Justice Witschief (179 Misc. 832, 38 N. Y. S. 2d 231) to the full extent thereof."

26

The Appellate Division, in reversing the judgment of the Trial Court, passed upon the federal question as follows (Record, p. 553), (45 N. Y. S. 2d 479, pp. 481-485), (267 A. D. 284):

"* * * Nor is it necessary for us to pass upon these questions because this judgment must be reversed for the reason that appellant and respondents were not engaged in commerce within the meaning of the Act, and Congress never intended it to apply to the situation disclosed by this record."

27

Record, page 554:

"The conclusion is irresistible that appellant was engaged in a strictly local as distinguished from a national activity, i. e., the local business of publishing a local newspaper. It did not produce goods for commerce within the meaning of the Act and, consequently, plaintiffs were not engaged in

28

any process or occupation necessary to the production thereof."

29

The question was raised on appeal to the Court of Appeals, by specification in the notice of appeal to that Court, that an appeal was taken from each and every part of the judgment of the Appellate Division (Record, p. 561). Under the practice of the State of New York, this was the prescribed method for bringing up a review of the entire judgment of the Appellate Division (Civil Practice Act, Section 562). The question was briefed in the briefs of both the petitioners and respondent submitted to the Appellate Division and to the Court of Appeals.

The Court of Appeals, after affirming the judgment of the Appellate Division without opinion on November 16, 1944, amended the remittitur on March 9th, 1945, to state as set forth above.

The grounds upon which it is contended that the question involved is substantial are set forth under the reasons for granting the writ *infra*, pages 15 to 18.

Statute Involved.

30

The statute involved is the Fair Labor Standards Act of 1938 (Act of June 25th, 1938, Chapter 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 210 *et seq.*). The particular provisions drawn into question herein are:

"Sec. 3. As used in this Act—

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof. •

31

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

32

"Sec. 7. (a) No employer shall, except as otherwise provided, in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a work week longer than forty-four hours during the first year from the effective date of this section,

"(2) for a work week longer than forty-two hours during the second year from such date, or

(3) for a work week longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

33

See also appendix A and B which set forth Section 13 pertaining to exemptions and portions of Section 15 pertaining to prohibited acts:

34

Statement of Matter Involved.

35

The petitioners were employees of the respondent who was engaged in publishing a daily newspaper at White Plains, New York. The petitioners were engaged in the process of obtaining, receiving and soliciting news, re-writing, editing and preparing the material for publication and obtaining news and advertising from various sources and preparing them for publication. They sued for overtime compensation under the Fair Labor Standards Act of 1938 and received an award of \$42,010.34 for overtime compensation under the Act from the Trial Court who tried the issues without a jury. This judgment was reversed by the Appellate Division of the Supreme Court, Second Department, on the law and on the facts and the complaint dismissed on the law and the reversal affirmed by the Court of Appeals.

36

The respondent, to produce its newspaper, made daily and immediate use of news dispatches received by direct teletype connection from the Associated Press and International News Service from points outside of the State of New York and from other states and foreign countries (Record, pp. 48, 146, 295). These teletype machines were operated daily from morning to night (p. 296). News items were sometimes taken off the teletype machines and printed without change (pp. 412, 441). Respondent had national advertising (pp. 48, 356) in the same proportion as any other daily newspaper of similar size (p. 356). Advertising mats were secured from a national advertising agency in Chicago, Ill. (p. 48), and cuts to reproduce pictures from Philadelphia, Pa. (p. 48), and comic strips, syndicated news, medical news columns and panels came from Chicago and California (p. 49). During the period in question, the respondent obtained its pictorial service from the Central Press Association

of Chicago, Ill. (p. 49). Some of the petitioners, at times, sold advertising in Connecticut and New Jersey to concerns in those states (p. 66) and some of the petitioners, as reporters, covered events in South Norwalk and Greenwich, Connecticut (p. 276). The paper used by the respondent came from Maine (p. 48). In February, 1939, respondent ran a full page advertisement announcing that they were expanding their national and international news service because of importance to their readers, because "the war would influence everyone's life," and because "of everyone's interest in world conditions" (p. 324). When France capitulated in this war a special edition of the paper was run (p. 445). The respondent had a daily, regular out-of-state circulation (pp. 64, 65) to about 45 subscribers located without the state (p. 357). The weekly* production for this purpose amounted to 270 copies or over 14,000 per year.

The total daily production fluctuated between 9,000 to 11,500 copies. The petitioners did not explore at the trial how many of the other copies produced and delivered to newsdealers or sold on the streets may have reached interstate commerce or how many were sent gratis or otherwise to national advertisers or similar persons. Defendant's Exhibit A, a study of small daily newspapers under the Fair Labor Act, prepared by the United States Department of Labor, Wage and Hour Division, Economics Branch, discloses that a sampling of out-of-state circulation of the average daily newspaper in an average territory varied from 8% to 9% of the total daily production. The out-of-town state circulation of the respondent was about .5%.

Under the agreement between the respondent and the International News Service Department and the King

* Overtime under the Fair Labor Act is computed upon a weekly base of 40 or more hours. (See 7-a of the Act, supra, which weekly base was varied each of the first three years of the Act.)

40 Feature Syndicate (p. 347), the respondent was obligated to send news items to the syndicate for republication in other parts of the country if of interest.

The respondent by its link to the Associated Press and the International News Service's nation-wide networks, was served by the same wireless, cable, and other means of communication that are used by the Press Services in receiving and transmitting news (pp. 295-296).

41 Under the respondent's agreement with the International News Service Department of the Kings Feature Syndicate, dated March 27, 1939 (Petitioners' Exhibit 15, admitted p. 347) news obtained or published by respondent was to be sent into the channels of interstate commerce upon request or if interest to the other subscribers of the news service.

The Appellate Courts below disregarded the use of interstate instrumentalities and the flow of materials from points outside of the state to the newspaper and considered only the sending of forty-five copies each day of each week to the subscribers out of the state. It further held that such number was too insignificant or too inconsequential under the doctrine of "*de minimis non curat lex*" to bring the respondent under the coverage of the Act.

42

Questions Presented.

1. Was the respondent* engaged in interstate commerce, or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938 during the period alleged in the complaint?

2. Was the Court below correct in refusing to consider all the interstate activity of the respondent proved

* If the respondent is held so engaged then each employee engaged in that process or in production of goods for such commerce is so engaged. *Kirschbaum v. Walling*, 316 U. S. 517.

except the actual mailing of the product each day to the out-of-state subscribers in determining the question of interstate commerce?

43

3. Was the doctrine of *de minimis non curat lex* applicable under the Fair Labor Standards Act and under the facts of this case?

Reasons for Granting the Writ.

1. The Appellate Division of the New York Supreme Court and the Court of Appeals have decided a federal question of substance not heretofore determined by this Court. The Appellate Division of the Supreme Court of the State of New York, in its opinion in this case, stated that it had made "independent search" (Record, p. 555) and that it had found no case in the United States Supreme Court where the Act was held applicable under the facts herein, stating (Record, p. 553):

44

"While the Supreme Court has sustained the constitutionality of the Act (*United States v. Darby*, 312 U. S. 100 (1 WH Cases 17), and *Opp Cotton Mills v. Administrator*, 312 U. S. 126 (1 WH Cases 26), it has not considered the precise questions now posed."

While District Judge J. T. O'Connor in *McKeown v. Southern California*, 52 Fed. Supp. 331, in holding that the *de minimis* doctrine was inapplicable in a case arising under the Fair Labor Act stated:

45

"This important ruling has not yet been passed upon by either the Circuit or Supreme Courts."

2. The Appellate Courts of New York have decided this federal question of substance not in accord with applicable decisions in this Court concerning Interstate Commerce.

- 46 3. The Appellate Courts of New York have definitely refused to follow the controlling decisions in the Federal Courts upon the issue involved. The newspaper cases where the precise issue was decided or discussed are:

Sun Publishing Company v. Walling, 140 Fed. 2d 445, certiorari denied U. S. , April 24th, 1944, 64 S. Ct. 496.

Fleming v. Lowell Sun Company, 36 Fed. Supp. 320, reversed on other grounds, 120 Fed. 2d 213, affirmed by an equally divided court 315 U. S. 784.

Schroepfer, et al., v. A. S. Abell Co., 138 Fed. 2d 111, certiorari denied U. S. , January 17th, 1944.

- 47 *Belo v. Street*, 36 Fed. Supp. 907.
Walling v. Oklahoma Press Publishing Company,
 District Court Oklahoma, June 12th, 1944,
 Fed.

The decisions in those cases and the discussions were to the effect that the employees of newspapers situated similarly as respondent were governed by the Fair Labor Standards Act of 1938.

4. There is a conflict between the many decisions in the United States District Courts on the precise point involved herein. The overwhelming authority, however, being with the contention of the petitioners.
- 48 5. The doctrine of "*de minimis non curat lex*" is not applicable under the Fair Labor Standards Act, the great weight of decisions under that Act and the Bulletins of the Wage and Hour Division of the Department of Labor all support this view. We collate in our brief the many cases which hold that under the history and structure of the Fair Labor Standards Act, the doctrine of "*de minimis non curat lex*" is inapplicable, especially where the out-of-state activity is not casual or spasmodic, but a regular, continuous daily feature such as in this case where the newspapers that were sent out of the state were sent

out each day of each week of each year to regular subscribers and the weekly or yearly production for that purpose was substantial in amount (over 14,000 copies per year). 49

6. The Administrator of the Wage and Hour Division of the Department of Labor has not acquiesced in the decision of the New York Appellate Courts below since both in the Appellate Division and in the Court of Appeals, the Administrator filed a brief "*amicus curiae*," urging that the respondent was engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938 under the facts proved in this case.

7. That this case is of the utmost public importance since if the decision of the New York Appellate Courts stands, it will exclude from the coverage of the Wage and Hour Law all the employees of virtually all daily newspapers published in New York State, since the circumstances of their publication is substantially similar to that of respondent. According to the 1940 U. S. census about one-third of the persons engaged in the producing of newspapers in the United States are located in the State of New York. If the decision of the Appellate Courts of New York stand, it will deprive a considerable number of those employees of the benefits of the Act. This will have the effect of adding to the Act a further exemption than the one provided for in Section 13 (a), Subdivision (8), (Appendix A), which exemption is restricted to employees of "any weekly or semi-weekly newspaper with a circulation of less than three thousand, the major part of which circulation is within the county where printed and published * * *." Congress never intended to exclude from the benefits of the Act employees of daily newspapers or other newspapers not specifically within the exemption quoted. 50

52 WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court to review the decision of the Court below.

Dated, April 10th, 1945:

COURTNEY M. MABEE, CHARLES K. BAR-
NUM, EDWARD G. TOMPKINS, NORTON
MOCKRIDGE, GEORGE S. TROW and
WILLIAM L. O'DONOVAN,

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53

DAVID H. MOSES,
STEPHEN R. J. ROACH,
On the Brief.

APPENDIX A.

54 Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivation, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of ani-

mal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products, or by-products thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semi-weekly newspaper with a circulation of less than three thousand, the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that
59 no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

COURTNEY M. MABEE, CHARLES K. BAR-
NUM, EDWARD G. TOMPKINS, NORTON
MOCKRIDGE, GEORGE S. TROW and WIL-
LIAM L. O'DONOVAN,

Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY, Inc.,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.****I.****Preliminary Statement.**

The opinions below, the statement of the matter involved, jurisdiction and the questions presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II.

Summary of Argument.

POINT I.

The business of receiving, transmitting, exchanging news, intelligence and advertising through the use of Interstate Communications and agencies constitutes Interstate Commerce and the Producing therefrom a product (a daily newspaper) constitutes producing goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

POINT II.

There is no expression in this Court in a case under the Fair Labor Standards Act which justified the courts below in applying the "de minimis" doctrine. On the contrary, this Court has said in effect otherwise.

POINT III.

The doctrine of "de minimis" is inapplicable under the facts and controlling decisions in the Federal Courts which decisions the Courts below refused to follow.

III.

Argument.

POINT I.

The business of receiving, transmitting, exchanging news, intelligence and advertising through the use of Interstate Communications and agencies constitutes Interstate Commerce and the Producing therefrom a product (a daily newspaper) constitutes producing goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

The provisions of the Act are set forth in the petition. Section 3 (a) includes "transmission" as well as "transportation" and "communication" "among the several states or from any state to a place outside thereof" within the word "commerce" as used in the Act.

Under Subdivision (i) "goods" includes "products" "or subjects of any character."

Under Subdivision (j) "produced" includes "handled" "or in any other manner worked on in any state * * *"

The decisions under the Act where employees of daily newspapers were concerned support the petitioners' contentions of coverage:

In *Sun Publishing Company v. Walling*, 140 Fed. 2d 445, certiorari denied 64 S. Ct. 496, April 24th, 1944, the Court said:

"The appellant publishes The Jackson (Tenn.) Sun, a newspaper with a circulation of 9,000 daily

and 11,000 on Sunday. Approximately 200 copies of each edition are sold outside of the state. An added number of copies are sent extrastate as complimentary or to national advertisers for confirmation of their advertisements. The newspaper is a member of the Associated Press and not only receives news from it but transmits to it news items originating in its own territory. It also receives news from the United Press Association, receives from out of the state the comic supplement which it distributes with its Sunday edition to both local and outside subscribers, and uses syndicated articles sent to it by mail from various national services. It carries a substantial volume of national advertising for out-of-state producers and distributors who usually send it their mats or electrotypes plates for printing. Substantially all of its paper and other materials are shipped to it from outside the state. Its employees include the writers and reporters who gather, compose and edit the news stories and write headlines, the linotypers and stereotypers, pressmen, subscription and circulation employees, and the like."

"The contention that the Act is not applicable to the appellant's business because its employees are not engaged in commerce or the production of goods for commerce, must be rejected on the authority, among others, of *Associated Press v. N.L.R.B.*, *supra*."

In *Fleming v. Lowell Sun Company*, 36 Fed. Supp. 320, reversed on other grounds 120 Fed. 2d 213, and affirmed by an equally divided Court, 315 U. S. 784. 1 WHR 418, at page 422:

"It is common knowledge that the instrumentalities of interstate commerce are used and affected by every newspaper in gathering and publishing news and preparing the newspaper for circulation both in and out of the State in which it is published. This point has been raised time and time again, and it is too late in this case, under the

doctrine laid down by the recent cases of *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1 LRR Man. 732), and *National Labor Relations Boards v. A. S. Abell Co.*, 97 F. 2d 951 (2 LRR Man. 679), and cases cited, to raise it successfully now. Cf. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *National Labor Relations Board v. Fairblatt*, 306 U. S. 601 (4 LRR Man. 535), where the Court said: "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small."

In *Walling v. Oklahoma Press Publishing Company*, U.S.D.C. E.D. Oklahoma, June 12th, 1944, the District Judge, in holding a local newspaper under the Act, stated:

"The Company receives its news in the usual manner. Out-of-state news is received over telegraphic wires by means of an automatic teletype machine which requires no one to operate. The Company then selects that part of such news as is desired and publishes it, discarding the remainder. Its out-of-state ads are received through the United States mail, a large part thereof being in the form of mats and electrotypes plates. The Company deals with an out-of-state representative in handling this out-of-state advertising. The advertisers pay an out-of-state representative, and the out-of-state representative in turn pays the Company, after deducting his commission. At the hearing, the Company admitted that much of its newspaper supplies, paper, machinery, etc., are purchased outside the State of Oklahoma."

Schroepfer, et al., v. A. S. Abell Co., 6 WHR 940, 138 Fed. 2d 111:

"There is no question but that the defendant is engaged in interstate commerce with respect to the publication of its papers, the gathering of news therefor and the sale of the portion of its papers sent out of the state. *N.L.R.B. v. A. S. Abell Co.*, 4 Cir., 97 F. 2d 951, 954 (2 LRR Man. 679)."

Belo v. Street, 36 Fed. Supp. 907, where the District Judge stated:

"Of course, the news is engaged' in interstate commerce. It sends its papers everywhere. It receives supplies and news from abroad."

Interpretative Bulletins of the Wage and Hour Division, United States Department of Labor, No. 1, at page 4:

"From this declared policy of Congress it is evident that, apart from certain specific exemptions enumerated later in the statute, Congress intended the widest possible application of its regulatory power over interstate commerce; and the Administrator, in interpreting the statute for the purpose of performing his administrative duties, should properly lean toward a broad interpretation of the key words, 'engaged in commerce or in the production of goods for commerce.' * * *"

Western Union Telegraph Company v. Lenroot, United States Supreme Court, January 8th, 1945, U. S. :

"It was long ago settled that telegraph lines when extending through different states are instruments of commerce and messages passing over them are a part of commerce itself. *Western Union Telegraph Co. v. James*, 162 U. S. 650, 654. That 'ideas, wishes, orders, and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage has also been held. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 356; cf. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 128 (1 LRR Man. 732). It is unnecessary to decide whether electric impulses into which the words of the message are transformed are 'goods' within the Act (cf. *Utah Power & Light Co. v. Pfof*, 286 U. S. 165; *Fisher's Blend Station, Inc., v. State Tax Commission*, 297 U. S. 650; *Electric Bond & Share Co. v. Securities & Exchange Comm.*, 303 U. S. 419), since the complaint is not based on 'shipment' of impulses as 'goods' but only of messages. We think telegraphic mes-

sages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act, as alleged in the complaint."

See also *Kirschbaum v. Walling*, 316 U. S. 517, and *United States v. Darby*, 312 U. S. 100.

Cases generally defining the scope of "Interstate Commerce" and Federal Acts which may be urged to support petitioners' contentions are:

Associated Press v. National Labor Board, 301 U. S. 103.

United States v. Underwriters Association, 322 U. S. 533, particularly at p. 549.

Polish National Alliance v. National Labor Relations Board, 322 U. S. 643.

POINT II.

There is no expression in this Court in a case under the Fair Labor Standards Act which justified the Courts below in applying the "de minimis" doctrine. On the contrary, this Court has said in effect otherwise.

In *United States v. Darby*, 312 U. S. 100, at p. 123, this Court stated:

"Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce for any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong., 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts."

In *Kirschbaum v. Walling*, *supra*, this Court noted, at page 521:

“Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, *if isolated, are only local.*” (Italics ours.)

It cannot be said that the respondent “isolated” itself from “Interstate Commerce.”

The Wage and Hour Administrator in his Interpretative Bulletin No. 5, page 5, stated:

“Where an employee is engaged in the production of any goods for interstate commerce, the act makes no distinction as to the percentage of his employer’s goods or of the goods upon which he works that move in interstate commerce. The entire legislative history of the act leads to the conclusion that Congress intended to exclude from the channels of interstate commerce all goods produced under labor conditions detrimental to the health, efficiency, and general well-being of workers. The President’s message advocating the passage of wage and hour legislation stated that ‘goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.’ The Congress expressly found in section 2 (a) (1) that the production of goods under labor conditions detrimental to health, efficiency, and general well-being of workers ‘causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States.’ The reference in section 15 (a) (1) to ‘any goods’ is convincing proof of this intent of Congress to make no distinction as to the percentage of goods which move in interstate commerce. That section makes it unlawful for any person ‘(1) to transport, offer for transportation,

ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7.'

"Thus, there is no justification for determining the applicability of the act to a particular employee on the basis of the percentage of the goods he produces, or of his employer's goods, which move in interstate commerce." (Italics ours.)

The United States Supreme Court as to interpretative bulletins said in *United States v. American Trucking Association*, 310 U. S. 534, at page 549:

"The Commission and the Wage and Hour Division, as we have said, have both interpreted Sec. 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' "

And in *Walling v. Oklahoma Press Publishing Company*, *supra*, the District Judge wrote in holding the employees under the Act:

"Since June 1, 1939, no papers have been sold by the Company to persons outside the State of Oklahoma, unless it might be said that the sending of papers to out-of-state advertisers constitutes a sale, although no sum is paid for the papers as such. The Company mailed, without charge, to former Muskogee residents in the armed forces approximately 120 copies of the Muskogee Daily Phoenix, and approximately 17 copies of the Muskogee Times-Democrat. The Company also mails to its out-of-state representative for advertisers a copy of each paper for each foreign advertiser. The number of papers so sent is approximately 67 daily."

In *Sun Publishing Company v. Walling*, *supra*, the Circuit Court said where 200 copies out of 9,000 were sold outside the state:

"Likewise it is unimportant that only a small percentage of appellant's newspapers are sent out of the state. *U. S. v. Darby*, 312 U. S. 100 (1 WH cases 17); *Chapman v. Home Ice Co.*, 136 F. 2d 353 (6 WHR 570) (C. C. A. 6). The Act, by its terms, is applicable to newspapers generally because by its express terms it exempts weeklies and semi-weeklies and those with circulations less than 3,000."

In *Fleming v. Lowell*, *supra*, the District Judge observed:

"The respondent contends, in resisting the order sought, that the Administrator is without jurisdiction over the respondent's affairs because of the infinitesimal amount of respondent's circulation that crosses the state lines.

"In support of this contention the respondent argues that more than 98% of its total average daily circulation is distributed entirely within the Commonwealth of Massachusetts. To be sure, the Congress in passing the Act was exercising its power to regulate commerce to correct and eliminate the conditions referred to in its findings set out in Section 2 (a) of the Act. However, the percentage or number of newspapers of the respondent that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states."

The Appellate Division below sought to distinguish this case by stating (Record, p. 560):

"Respondents also rely on *Fleming v. Lowell Sun Co.* (36 F. Supp. 320; reversed on other grounds, 120 F. 2d 213, and *affd.* by an equally divided court, 315 U. S. 784). That case, so far as material, is authority only for the proposition that a large newspaper is engaged in interstate commerce. (See *Schroepfer v. A. S. Abell Co.*, *supra*, p. 115.)"

The Wage and Hour Administrator has expressly denied any such distinction. See Defendant's Exhibit A, page 67:

"The Wage and Hour Division has generally held that employees of small newspapers, when not specifically exempted by the language of Section 13 (a) (8) of the Act, are covered by the wage and hour provisions of the law if they aid in the flow of interstate commerce to the paper or if they help to produce a paper or job work which goes outside the state or leads to a flow of commerce across state boundaries.¹ This interpretation has been applied to small newspapers as well as large ones, and almost all newspaper employees not specifically exempted have, in short, been held to be covered."

POINT III.

The doctrine of "*de minimis*" is inapplicable under the facts and controlling decisions in the Federal Courts which decisions the Courts below refuse to follow.

The Courts below relied on three cases in the District Courts. These cases are:

Goldberg v. Worman, 37 Fed. Sup. 778.

Zehring v. Brown Materials, 48 Fed. Sup. 740.

Sapp, et al., v. Horton's Laundry, 56 Fed. Sup. 901.

They are opposed by such cases as:

McKeown v. Southern California, 52 Fed. Supp. 331, 6 WHR 1016, where District Judge J. T. O'Connor refused to apply the doctrine under the Wage and Hour Law where the interstate activity, as small as it might be,

¹ Wage and Hour Division, press releases, July 14, 1939, and August 13, 1941.

was a regular every-day and every-week part of the business of the employer and was not casual or spasmodic. He stated:

"The activities of the plaintiff, under the facts, were not casual nor spasmodic, but rather a continuous, regular and integral part of his everyday and every week business, partaking of an interstate character. Withholding recognition of these salient factors would be interpolating language into the Act which was not intended by Congress nor observed by the cases construing the statute. It is the opinion of this court that the rule *de minimis* is not applicable in view of the decisions cited and the stipulation submitted."

In *Ling, et al., v. Carrier Lumber Co.*, 6 WHR 401, 50 Fed. Supp. 204, the District Judge, in noting that this Court stated in *United States v. Darby* that Congress "has made no distinction as to the volume or amount of shipments," stated:

"Therein lies the distinction and in our opinion it is now generally accepted that when even less than one per cent of one's business is in interstate commerce, that business is subject to the Fair Labor Standards Act, unless that 'less than one per cent' was a casual or isolated sale."

Also:

Drake v. Hirsch, 40 Fed. Sup. 290, 1 WHC 702, U. S. D. C. N. D. Georgia.

Muldowney v. Seaberg Elevator Co., 39 Fed. Supp. 275, 1 WHC 605, U. S. D. C. E. D. New York.

Nelson v. Southern Ice Co., U. S. D. C. N. D. Texas, 1 WHC 787.

Strand v. Garden Valley Telephone Co., 6 WHR 1087, U. S. D. C. District of Minnesota.

Elmore v. Cromer & Beaty Co., Inc., 6 WHR 861, U. S. D. C. W. D. South Carolina, August 2, 1943.

Philips v. Star Overall Dry Cleaning Co., 7 WHR 92, U. S. D. C. S. D. New York, January 6, 1944.

Dorner v. Iaco Clothes, Inc., 7 WHR 35, U. S. D. C. N. D. Illinois.

Walling, etc., v. Partee, et al., 6 WHR 863, U. S. D. C. Tennessee.

Walling v. Oklahoma, 7 WHR 655, U. S. D. C. E. D. Oklahoma.

Gerdert v. Certified Poultry & Egg Co., 38 Fed. Supp. 964, 1 WHC 577.

Wood v. Central Sand & Gravel Co., 33 Fed. Supp. 40, 1 WHC 326.

And others.

The most that may be said of the few cases representing the minority view is that if the Interstate Commerce activities are "casual," "spasmodic," "isolated," "rare" or "occasional" there might be some basis for invoking the doctrine although this Court has never said so and the Wage and Hour Administrator has denied it. But where, as here, the Interstate Commerce is a regular every-day, every-week activity, the doctrine, no matter how far it may be stretched, is wholly inapplicable. Furthermore, the case at bar involving a daily newspaper is radically different than the three cases cited above relied upon by the respondent. The respondent herein is dependent upon its direct tieup with instrumentalities and agencies of Interstate Commerce to produce its product without which it could not successfully compete or operate as a daily newspaper.

The Appellate Division below seized upon a stray sentence in *National Labor Relations Board v. Fainblatt, supra* (p. 607), to justify invoking the doctrine of "*de minimis*." This they were not justified in doing because:

1. The decision in the *Fainblatt* case was under another Federal Act and as Mr. Justice Frankfurter so

aptly stated in *Federal Trade Commission v. Bunte*, 312 U. S. 349, 353:

“Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.”

2. The statement was not necessary to the decision nor was the doctrine actually invoked in that case.

3. There is further language in this same case contrary to respondent's position.

4. And as the Court observed in the same case (p. 606):

“The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.”

Neither is present under the Wage and Hour Law. First of all, under Section 15 (a) (1) as pointed out in the Administrators Interpretative Bulletin No. 5, the Act refers to “any goods” thereby negating the idea that no goods, unless substantial in volume, should be covered under the Fair Labor Standards Act, and as the Administrator also pointed out, the Congress had carefully worked out the many exceptions or exemptions and specifically exempted newspapers having a circulation of 3,000 or less “the major part of which circulation is within the county where printed and published * * *.” The Congress well knew that most daily local papers would necessarily have a small percentage of circulation beyond the place of publication. With this in mind they selected the special type of newspaper to be exempted and there included all others that utilized the channels of interstate commerce.

An example of an express provision for exemption is the Motor Carrier Act of 1935 which was enacted by almost the same Congress that enacted the Fair Labor Standards Act. Since the Fair Labor Standards Act, by express provision, refers to the Motor Carrier Act of 1935, it may be said that these Acts are in "*pari materia*."

In the Motor Carrier Act, the express provision exempting the carriers is found in Section 203 (b) (9) which is as follows:

"the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business * * * are exempt."

If it took an express provision to exempt even a casual or occasional transporter of persons or property from the provision of the Motor Carrier Act then surely it would take an express provision to exempt a newspaper which did not already come under the express exemption where such newspaper was in regular, daily use in the channels of interstate commerce and daily shipped a portion of their products interstate.

IV.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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DAVID H. MOSES,
STEPHEN R. J. ROACH,
On Brief.

Dated, April 10th, 1945.

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CHARLES ELMORE CROLEY

IN THE
Supreme Court of the United States

October Term, 1945.

No. 57.

COURTNEY M. MABEE, CHARLES K. BARNUM,
EDWARD G. TOMPKINS, NORTON MOCK-
BRIDGE, GEORGE S. TROW and WILLIAM L.
O'DONOVAN,

Petitioners,

AGAINST

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

BRIEF FOR THE PETITIONERS.

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- (1) The Appellate Division under the National Labor Relations Board, v. Fainblatt, 306 U. S. 301, applied the “de minimis” doctrine to the facts in the instant case. This

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

COURTNEY M. MABEE, CHARLES K.
BARNUM, EDWARD G. TOMPKINS,
NORTON MOCKRIDGE, GEORGE S.
TROW and WILLIAM L. O'DONOVAN;

Petitioners,

No. 57.

AGAINST

WHITE PLAINS PUBLISHING
COMPANY, INC.,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

BRIEF FOR THE PETITIONERS.

Opinions.

The opinion of the Trial Court (R.* pp. 88 to 95), Supreme Court, Westchester County, is reported at 180 Misc. 8; 41 N. Y. S. 2d 534.

The opinion on the motion to dismiss the complaint is reported at 179 Misc. 832; 37 N. Y. S. 2d 231.

*R. refers to record in this Court.

The opinion of the Appellate Division of the Supreme Court (R. 97 to 103) is reported at 267 A. D. 284; 45 N. Y. S. 2d 479.

There was no opinion in the Court of Appeals except a memorandum reported at 293 N. Y. 781 and the judgment of the Court of Appeals affirming the reversal is at R. 103-104.

The order of the Court of Appeals amending the remittitur appears at R. 105, and is reported at 294 N. Y. 701.

Jurisdiction.

The jurisdiction of this Court was invoked under Section 237 (b) of the Judicial Code, as amended, by the Act of February 13th, 1925, and this Court granted certiorari on May 21st, 1945 (89 Law Ed. 1157) (R., p. 106).

Questions Presented.

1. The Appellate Division below has stated that question as follows (R. 98):

“The principal question presented is: Does the Act apply to appellant, and were its employees—respondents herein—engaged ‘in any process or occupation necessary to the production’ of goods in interstate commerce within the meaning of section 3 (j) of the Act?”*

2. There was also present the question as to whether the respondent, viz., the newspaper was engaged in the production of goods for interstate commerce under the Act.

3. Whether the respondent's out-of-state circulation was so small as to preclude coverage under the doctrine

*Fair Labor Standards Act hereinafter referred to as the “Act”.

"*de minimis non curat lex*" and is that doctrine applicable to cases arising under the Act.

Statute Involved.

The pertinent provisions of the Fair Labor Standards Act of 1938 are set forth in the Appendix A, *infra* (pp. 43 to 45). (52 Stat. 1060, 29 U. S. C. Sec. 201, *et seq.* Public—No. 718—75th Cong.; Chap. 676—3rd Session.)

Statement.

The petitioners were employees of the respondent. The respondent was engaged in publishing a daily news paper at White Plains, New York. The petitioners were engaged in the process of obtaining, receiving and soliciting news, rewriting, editing and preparing the material for publication and obtaining news and advertising from various sources and preparing that for publication.

The Trial Court held: (R. 89):

"Evidence upon the trial established that each of the plaintiffs was employed in producing and working on such goods in a process and occupation necessary to the production thereof (F. L. S. A. of 1938, sec. 3 [j]; Interpretive Bulletin No. 1 [5])."

The petitioners brought an action in the New York Supreme Court, Westchester County, for overtime compensation under Section 7 of the Act.

The respondent first moved in the New York Supreme Court to dismiss the complaint claiming the facts therein failed to constitute a cause of action or specifically for the reason that the respondent was not engaged in interstate commerce. The Justice presiding at Special Term, who heard this motion, denied the same. His opinion is reported at 179 Misc. 832 (38 N. Y. S. 2d 231).

The parties stipulated to try the case without a jury and it was tried at a Trial Term of the Supreme Court, Westchester County, and an award of \$42,010.34 was granted to petitioners by the Trial Judge.

The respondent appealed to the Appellate Division of the New York Supreme Court from such judgment and the Appellate Division reversed the judgment of the Trial Court on the law and on the facts and dismissed the complaint on the law.

The petitioners then appealed to the New York Court of Appeals which affirmed the decision of the Appellate Division without opinion.

The petitioners thereafter moved in the Court of Appeals for an amendment of the remittitur so as to state the federal question involved and, on March 9th, 1945, the Court of Appeals granted such motion (R. 105) (294 N. Y. 701) and amended the remittitur as follows (R. 105):

"Motion to amend remittitur granted. Return of remittitur requested and when returned it will be amended by adding thereto the following: Upon this appeal there was presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. This court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938."

Summary of Facts.

The respondent published its paper at White Plains, New York, a city of about 40,000 (1940 U. S. Census). The respondent was a member of the Associated Press

and International News Service receiving daily from them national and international reports from all over the world (R. 30, 32, 38, 50, 51, 54, 66, 67, 73, 85).

The respondent, by its link to the Associated Press and the International News Service's national wide networks, was served by the same wireless, cable and other means of communication that are used by the Press Services in receiving and transmitting news and intelligence. Thus, respondent's operations involved "the constant use of channels of interstate and foreign communications" (*Associated Press v. N. L. R. B.*, 301 U. S. at 128).

Not only was the respondent engaged in interstate commerce through the receipt of news over the national and international networks of Associated Press and International News Service wires, but it was also engaged in the reverse process of sending news via the same wires which it had collected locally, under its contract with the news agencies. This is evidenced by Paragraph Fourth of the respondent's contract with the International News Service (Exhibit 15, R. 85), which is as follows:

"FOURTH: The Publisher agrees to furnish to International News Service at the office of the Publisher for publication and/or distribution all local news and special service from tributary news territory collected by the Publisher, without cost to International News Service."

This in effect constituted the respondent as the agent to gather news originating in their territory and furnish it to the International News Service for distribution throughout the country.

Furthermore, this Court may take judicial notice of the factual nature of the few press agencies existing in this country as found in *Associated Press v. N. L. R. B.*, 301 U. S. 103, where the Court held that the Associated

Press was engaged in interstate commerce and if the Association was so engaged then each member or part thereof should likewise be engaged in interstate commerce.

The respondent had leased wire printers or teletypes (R. 50, 51).

The teletype machines over which the International news and Associated news dispatches came were operated daily from morning to night (R., p. 51). News items were sometime taken off the teletype machines and printed without change (R., p. 71).

Respondent had national advertising in the same proportion as any other daily newspaper of its size (R., p. 57).

Its advertising mats were secured from a national advertising agency in Chicago, Illinois (R., p. 30). Its cuts to reproduce pictures came from Philadelphia, Pa. (R., pp. 30, 37, 57, 58).

Comic strips, syndicated news, medical news columns and panels came from Chicago and California (R., p. 31).

The pictorial service of the Central Press Association of Chicago, Illinois was used by the respondent (R., p. 31).

The paper which the respondent used to produce its newspaper came from Maine (R., p. 35).

Some of the petitioners at times traveled from the State of New York to places in Connecticut and New Jersey where they sold advertising space in the newspaper (R., p. 34).

Some of the petitioners traveled from New York to South Norwalk and Greenwich, Connecticut to cover events which were reported in the newspaper when printed (R., p. 48).

The petitioners also proved that the respondent was likewise engaged in interstate commerce since they shipped in interstate commerce to prepaid subscribers outside of the State of New York about 45 papers each day of each week of each year. The yearly circulation for this pur-

pose was over 14,000 copies per year which was a regular, daily, continuous practice.

Summary of Argument.

1. The respondent* was engaged in interstate commerce and in the production of goods for interstate commerce because:

(a) It published a daily newspaper in the City of White Plains, New York, every edition of which was composed in part of news received over the International News Service of the Associated Press and International News Service, photographs, cuts, advertising matter, mats containing syndicated articles and similar matter regularly received from out of state sources.

(b) In reverse, it gathered local news in and about the City of White Plains, New York and sent and transmitted the same over the International Network of International News Service and Associated Press; and

(c) Actually distributed a portion of its product every day to at least 45 paid subscribers located out of the State of New York.

(d) The theory that under the receiving aspect of this case there was such a pause between the receipt of interstate and international news and its transmission to the subscribers of the paper as to break the continuity of transit to such an extent as to have the interstate journey come to an end, is not applicable to a daily newspaper. A daily newspaper can only survive and compete with

*If the respondent is held so engaged, then each employee that engaged in that process or in the production of goods for such commerce, is so engaged. *Kirschbaum v. Walling*, 316 U. S. 517 (R., pp. 89-90). Evidence upon the trial established that each of the plaintiffs was employed in producing and working on such goods in a process and occupation necessary to the production thereof (F. L. S. A. of 1938, Sec. 3 [j]; Interpretive Bulletin No. 1 [5]).

other forms of news agencies if its news and material is transmitted to the reading public as fast as modern science permits. Concededly this national and international news was transmitted to the subscribers as fast as possible and in many instances where the importance of the news warranted it, special editions were gotten out.

2. It was conceded that the shipping of a portion of the newspapers published to out of state points was an engagement in interstate commerce, but the Appellate Courts below erroneously ruled that such portion was too small and insignificant to be considered in determining coverage on the doctrine of "*de minimis non curat lex*." The State Courts erroneously justified the application of this doctrine on the decision of this Court in *National Labor Relations Board v. Feinblatt*, 306 U. S. 601.

The National Labor Relations Act was intended to cover acts or transactions that *materially* affected the flow of raw materials, etc. or *substantially* impaired or disrupted the market for goods flowing from or into the channels of commerce.

Of course, under the phraseology of that act, the *de minimis* theory might apply but since no such words are used in the act now under consideration the *de minimis* theory can have no application and it is obvious, from the legislative intent and the decisions of the Federal Courts, that the act was intended to apply wherever the employee was engaged in interstate commerce without reference as to the magnitude or the extent to which such interstate commerce was present.

3. Assuming, but not conceding that under some circumstances the "*de minimis*" doctrine might be applicable, it clearly could not apply to any case such as the case at bar where the out of State activities were a daily, regular, continuous every day, every week and every

month practice and was not casual, spasmodic, isolated, rare or occasional. The two district court cases in the Federal Courts relied upon by the Appellate Division were not newspaper cases and were never considered authoritative or approved by this Court and are clearly distinguishable and contrary to the overwhelming weight of authority in the Federal Courts.

ARGUMENT.

POINT I.

The business of receiving, transmitting, exchanging news, intelligence and advertising through the use of interstate communications and agencies constitutes interstate commerce and the producing therefrom a product (a daily newspaper) constitutes producing goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938

The Act applies to all employees engaged in commerce or in the production of goods for commerce and provides:

“Sec. 3. As used in this Act

• • •

(b) ‘Commerce’ means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

• • •

(i) ‘Goods’ means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof,

but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Under the facts that we have related the respondent was engaged, among other things, in "communication" among the several states since by their membership in the news associations, they were constantly communicating and exchanging news items through the country.

Since under the Act "Goods" includes "subjects of commerce of any character" as well as "wares", "products"; "commodities" and "merchandise"; it is idle to argue that a newspaper is not an article of commerce.

Under the term "Produced" as used in the Act, the respondent was engaged in the production of "goods" since a newspaper is obviously as much of a "product" as a book.

Whenever a case of a newspaper receiving, exchanging news and producing a daily paper therefrom as the respondent did in this case was presented to any of the Federal Courts, they were unanimous in holding coverage under the Act. In *Sun Publishing Company v. Walling*, 140 Fed. 2d 445, certiorari denied 322 U. S. 728 (CCA-6) Simons, C. J., in holding the employees of The Jackson Sun, a newspaper with approximately the same circula-

tion as that of the respondent, covered by the Act, observed (p. 445):

"The appellant publishes The Jackson (Tenn.) Sun, a newspaper with a circulation of 9,000 daily and 11,000 on Sunday. Approximately 200 copies of each edition are sold outside of the state. An added number of copies are sent extrastate as complimentary or to national advertisers for confirmation of their advertisements. The newspaper is a member of the Associated Press and not only receives news from it but transmits to it news items originating in its own territory. It also receives news from the United Press Association, receives from out of the state the comic supplement which it distributes with its Sunday edition to both local and outside subscribers, and uses syndicated articles sent to it by mail from various national services. It carries a substantial volume of national advertising for out-of-state producers and distributors who usually send it their mats or electrotypes plates for printing. Substantially all of its paper and other materials are shipped to it from outside the state. Its employees include the writers and reporters who gather, compose and edit the news stories and write headlines, the linotypers and stereotypers, pressmen, subscription and circulation employees, and the like."

• • •

"The contention that the Act is not applicable to the appellant's business because its employees are not engaged in commerce or the production of goods for commerce, must be rejected on the authority, among others, of *Associated Press v. N. L. R. B.*, *supra*."

The newspaper in the *Sun Publishing Co.* case in their petition to this Court for certiorari not only raised the question that the newspaper was not engaged in interstate commerce but referred to the instant case as one of its authorities for that proposition (Petition for Writ of Certiorari, p. 24) and claimed that that decision conflicted with the holding in *Schroepfer v. A. S. Abell Co.*, 138 Fed. 2d 111, certiorari denied 321 U. S. 763.

The *Schroepfer* case was relied upon by the Appellate Courts of New York in denying coverage in the instant case. An examination of the opinion in that case clearly discloses that it is not authority for the negation of coverage under the Act. On the contrary, the Court (Parker, C. J.) recognized that the newspaper was engaged in interstate commerce when he said at page 113

"There is no question but that the defendant is engaged in interstate commerce with respect to the publication of its papers, the gathering of news therefor and the sale of the portion of its papers sent out of the state. *N. L. R. B. v. A. S. Abell Co.*, 4 Cir., 97 F. 2d 951, 954 (2 LRR Man. 679)."

And, no doubt had the question in the *Schroepfer* case arisen between the newspaper and its employees, the Court would have held that the latter were under the coverage of the Act but the learned Circuit Court Judge in that case thought that after the paper had been sold to distributors (rackmen) who sold and distributed without any supervision or control by the newspaper, these rackmen were not employees of the newspaper, but independent contractors and, therefore, not covered by the Act.

There are other case where the Federal Courts have considered the coverage under facts strikingly similar to the case at bar. In each instance that Act was held to apply.

In *Fleming v. Lowell Sun Company*, 36 Fed. Supp. 320, D. C. Mass., reversed on other grounds 120 Fed. 2d 213, and affirmed by an equally divided Court, 315 U. S. 784, 1 WHC 418, the Court said at page 326 (Ford, D. J.):

"It is common knowledge that the instrumentalities of interstate commerce are used and affected by every newspaper in gathering and publishing news and preparing the newspaper for circulation both in and out of the State in which it is published. This point has been raised time and time again, and it is too late in this case, under the doctrine laid down by the recent cases of *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1 LRR Man. 732), and *National Labor Relations Board v. A. S. Abell Co.*, 97 F. 2d 951 (2 LRR Man. 679), and cases cited, to raise it successfully now. Cf. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601 (4 LRR Man. 535), where the Court said: 'The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small'."

In *Walling v. Oklahoma Press Publishing Company*, U. S. D. C. E. D. Oklahoma, June 12th, 1944, 7 WHR* 655, the District Judge, in holding a local newspaper under the Act, stated:

"The Company receives its news in the usual manner. Out-of-state news is received over telegraphic wires by means of an automatic teletype machine which requires no one to operate. The Company then selects that part of such news as is desired and publishes it, discarding the remainder.

*Wage and Hour Reporter.

Its out-of-state ads are received through the United States mail, a large part thereof being in the form of mats with electrotpe plates. The Company deals with an out-of-state representative in handling this out-of-state advertising. The advertisers pay an out-of-state representative, and the out-of-state representative in turn pays the Company, after deducting his commission. At the hearing, the Company admitted that much of its newspaper supplies; paper, machinery, etc., are purchased outside the State of Oklahoma."

Belo v. Street, 36 Fed. Supp. 907, affd. 121 Fed. 2d 207, affd. 316 U. S. 624, Feb. 4, 1941, D. C. N. D. Texas, Atwell, D. J., stated:

"Of course, the news is engaged in interstate commerce. It sends its papers everywhere. It receives supplies and news from abroad."

The first two Judges who heard this case at Trial Term were of the same views:

Mr. Justice Witschief, at Special Term, 179 Misc. 832; 38 N. Y. S. 2d 231:

"All of the objections made to the Fair Labor Standards Act of 1938 in regard to its application to the defendant have been overruled in the U. S. District Court for the District of Massachusetts, in *Fleming, Adm'r, etc. v. Lowell Sun Co.*, 36 F. Supp. 320. The Federal Courts have held that newspapers are subject to the Fair Labor Standards Act of 1938. *A. H. Belo Corporation v. Street*, D. C., 36 F. Supp. 907. And the U. S. Supreme Court has held that the Associated Press is engaged in interstate commerce. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 57 S. Ct. 650,

81 L. Ed. 953. That Congress considered the act as applicable to daily newspapers is indicated by the eighth exemption in Section 13 of the act which excludes weekly or semi-weekly newspapers with a circulation of less than 3,000, the major part of which is in the county where the publication is issued. It is not for this court to consider either the wisdom or the justice of the application of the act to daily newspapers in such localities as White Plains, only a very small portion of whose circulation goes without the state."

Opinion of Trial Judge (R. 89):

"Prior to the trial the defendant had moved before Mr. Justice Witschief to dismiss the complaint. The questions raised upon that motion were decided in accordance with the statute and authoritative precedents. The court at this time reaffirms the decision of Mr. Justice Witschief (179 Misc. 832, 38 N. Y. S. 2d 231) to the full extent thereof."

The Appellate Division below (R. 101) observed that the respondent purchased its supplies, mats and other features and received reports of the Associated Press from outside of the State of New York and on the authority of the *Schroepfer* case stated (R., p. 101):

"It is inconceivable, at least to us, that because appellant purchased, outside New York, materials used in the production of its newspaper, that it is subject to the Act. Obviously, when these supplies were delivered to appellant's plant they arrived at their destination and their interstate movement ended."

What the Appellate Court overlooked was that the interstate journey of the news, advertising matter, reproduced photographs, cuts, etc. did not end upon their receipt by the newspaper but they were, as fast as modern science would permit it, passed on to the ultimate consumer—the reader.

As this Court stated in *Walling v. Jacksonville Paper Company*, 317 U. S. 564, 568, a temporary pause in their transit does not mean that they are no longer “in commerce” within the meaning of the Act. Furthermore, as this Court noted in the same case, the receiving of merchandise from out-of-state sources without shipping the same across state lines did not destroy the interstate character of the transaction and that (p. 566):

“Employees who are engaged in the procurement or receipt of goods from other states are ‘engaged in commerce’ within the meaning of the Act.”

Very recently (September 28th, 1945) the United States District Court, N. D. Iowa, after an exhaustive review of the authorities, came to the same conclusion in a case involving the distribution of petroleum. *Keen v. Mid-Continent Petroleum Corporation*, No. 131, 8 WHR 1029.

What the Appellate Division below also overlooked was that the respondent was engaged in the process of gathering and sending news, gathering news in its locality to be sent throughout the country and publishing news received via press wires from all over the country. This gathering and exchanging and publishing of news constituted engaging in interstate commerce under the Act regardless of the area of the paper's circulation. If the respondent omitted to publish its daily paper but merely was one of the link in the gathering and exchanging of news for the press services under its contract (Exhibit 15), it would

still be engaged in interstate commerce within the meaning of the Act so that the number of papers actually distributed outside the State is entirely immaterial. (See Points II and III.)

The Appellate Division in reviewing the theory of coverage in this case, based its decision upon dicta contained in the voluminous opinion of Judge Parker in the *Schroepfer* case and failed to cite any Federal case in which the decision supported this view. At page 102 of the Record, the Appellate Division states:

"No do we believe that when appellant (fol. 555) obtained news reports and other matter from sources outside New York and edited and reproduced some of them in its newspaper, that it became subject to the Act. As stated by Judge Parked in the case last cited [*Schroepfer* case]: 'In the case at bar, there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere "milling in transit" but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients.' The transmission of extra state news by appellant to its readers did not involve that 'practical continuity of movement' of which the court spoke in *Walling v. Jacksonville Paper Co.* (*supra*). If respondents' reasoning be adopted, then, as stated by Mr. Justice McReynolds in his dissenting opinion in the *Fainblatt* case (*supra*): 'the power to regulate inter-

state commerce brings within the ambit of federal control most* if not all activities of the nation; * * *. For instance, a baker in Brooklyn, who purchases his flour from a concern in Minnesota and whose sales are limited to his local neighborhood, would be engaged in interstate commerce and subject to the Act if, at a customer's request, each week he sent a box of cookies to the latter's son at (fol. 556) the training station in Pensacola, Florida. Of course, no such result was intended by Congress."

As this Court held in the *Walling* case, which involved the transportation of paper and supplies pursuant to regular orders, involved a "practical continuity of movement", then surely this Court should hold that the transmission of news from the International news wires to a daily newspaper must necessarily involve a much greater "practical continuity of movement" because news, to constitute news, must follow the happening of the event with the greatest possible rapidity.

The Appellate Division overlooked the fact that the respondents did, as far as modern science would enable them, deliver the news report to the reader and many times in the same identical language in which it was received. Furthermore, there was a constant stream of advertising cuts, reproduced photographs and syndicated columns which were to reach the reader as speedily as possible.

Furthermore, the illustration by the Appellate Division of the baker's case (*Goldberg v. Worman*, 37 Fed. 2d 778 D. C. Florida) is not a comparable one. A baker does not receive his flour and materials through some sort of teletype machine or is he a member of an asso-

*Jackson, J., in *E. S. v. Underwriters Association* (322 U. S. 533) at p. 586:

"I have little doubt that if the present trend continues federal regulation eventually will supersede that of the states."

ciation that exchanges or transmits news interstate, and it is common knowledge that a baker would buy his flour and other materials in large quantities which would go into storage and a large part of each shipment might not reach the ultimate consumer for months to come. As we point out *infra* (p. 38), this case is an isolated one and not considered authoritative and contrary to the overwhelming weight of authority in the Federal Courts.

The Appellate Division's conclusion (p. 99) where it held:

"The conclusion is irresistible that appellant was engaged in a strictly local as distinguished from a national activity i. e., the local business of publishing a local newspaper."

is of no importance, because this Court has expressly held that

"The fact that all of respondent's business is not shown to have an interstate character is not important" (*Walling v. Jacksonville Paper Co.*, 317 U. S. 571).

Likewise, it was equally unimportant that the Appellate Division called the respondent "a strictly local enterprise" (R., 101).

The fact that some of its business or even most of its business was local is immaterial, provided it has shown, as in this case, that at least some of its business is interstate.

The review of the character of the activities of local daily newspapers throughout the country by the Wage and Hour Administrator (Deft.'s Exh. A) coincide with our contention.

This report says (p. 66):

"While the point of view and circulation of the small paper are essentially local, the typical small

paper has sufficient interstate connections and depends to so large an extent upon the channels of interstate commerce and communication that any picturization of it as a 'strictly local enterprise' is misleading."

To summarize; the record demonstrated that the respondent was engaged in interstate commerce because:

1. It produced a product, a newspaper, which it shipped in interstate commerce;
2. It received news matter, material, cuts, and supplies, etc., from interstate sources which went into its product;
3. As a member of interstate news agencies, it was constantly receiving and obligated to send and exchange news items from and to all parts of the country across state lines.

The respondent's business was an engagement in interstate commerce and the production of goods for interstate commerce within the meaning of the Act and the Trial Court was correct in holding that each of the petitioners engaged in that process or in the production of goods for such commerce was so engaged (*Kirschbaum v. Walling*, 316 U. S. 517).

The Appellate Courts below were in error in disturbing the judgment of the Trial Court.

POINT II.

There is no expression in this court in a case under the Fair Labor Standards Act which justified the courts below in applying the "de minimis" doctrine. On the contrary, this court has said in effect otherwise.

The point now under consideration will be discussed under the following sub-heads:

(1) The Appellate Division under the *National Labor Relations Board* against *Fainblatt*, 306 U. S. 301, applied the *de minimus* doctrine to the facts in the instant case. This they were not justified in doing because that case was under another Federal statute and this Court in cases arising under the Act have in effect said otherwise.

(2) The Legislative history of the Act clearly shows that the *de minimus* doctrine is wholly inapplicable.

(3) The Wage and Hour Administrator in his investigations and administration under the Act has found the *de minimus* doctrine inapplicable.

(1)

The Appellate Division in applying the *de minimus* theory relied primarily upon the decision of this Court in *National Labor Relations Board* against *Fainblatt*, 306 U. S. 301.

In the findings and declaration of policy of the *National Labor Relations Act* (Title 29, Sec. 151 U. S. C. A.) (49 Stat. 449), Sec. 1, Congress used the phrase:

" . . . materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods

in commerce; or (d) causing diminution of employment and wages in such volume as *substantially* to impair or disrupt the market for goods flowing from or into the channels of commerce.” (Italics ours.)

No such words as “materially affecting” or “substantially” were used in the Fair Labor Act.

The “critical words” of the National Labor Relations Act are “affecting commerce” (*Santa Cruz Fruit Pack. Co. v. National Labor Relations Board*, 303 U. S. 453, 467).

It is therefore clear that the application of the *de minimis* theory in construing the National Labor Relations Board Act can have no application whatever to the Fair Labor Act where the materiality or the substantiality of the services performed is not recognized and does not form a test as to the applicability of the Act. This Act was intended to remedy substandard conditions wherever found without reference to the materiality or substantiality, which those conditions bore to interstate commerce. This is in line with the opinion of Mr. Justice Frankfurter, who so aptly stated in *Federal Trade Commission v. Bunte*, 312 U. S. 349, 353:

“Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.”

Furthermore, this Court in the *Fainblatt* case recognized that volume was never to be a criterion unless there was some express provision in the Act making it so or in the Act by implication, a circumstance not present in the Fair Labor Act.

An example of an express provision which this Court must have had in mind is Section 203 (b) 9 of the Motor Carrier Act of 1935 which was enacted by almost the same Congress that enacted the Fair Labor Standards Act:

" . . . the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business . . . are exempt" (from Motor Carrier Act).

Likewise, in the Social Security Act 52 Stat. 1110, 42 U. S. C. A. Sec. 1107, wherein employers employing eight or less persons each of some twenty days during the taxable year were exempt from the Act. There, of course, are other examples under federal statutes.

The only express provision in the Act as to volume is in the exemption of Section 13, Subdivision 8. This Subdivision exempts from the coverage of the Act any employee of a weekly or semi-weekly newspaper "with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published."

Further exemptions appear in the Act for certain employees of a "retail" or "service" establishment "the greater part" of whose time in intrastate commerce (13 a-2 of Act) and public telephone exchanges have then less than a stated number of stations (13 a-11). An express or implied provision exempting *daily* newspapers was not inserted by Congress in the Act.

The exemptions to the Act were carefully worked out and were the subject of considerable debate* by Congress. Congress well knew that most daily newspapers would necessarily have a small percentage of circulation beyond the place of publication. With this in mind they selected the special type of newspaper to be exempted and thereby included all others that utilized in any respect the channels of interstate commerce. As the Wage and Hour Administrator significantly pointed out in his Interpretative

*Law & Contemporary Problems, Vol. VI, No. 3, Summer 1939, pages 483-487.

Bulletin No. 5 (p. 6) that the provision, Section 15, defining prohibited acts makes it unlawful for any person to transport or sell in commerce "any goods" in the production of which "any employee" was employed in violation of the minimum wage and overtime provisions. This negatives the idea that nothing is prohibited unless substantial in volume or if the volume is very small or even insignificant the prohibition and the Act does not apply. This would defeat the very purpose of the Act and the effect would be to add further exemption to the statute which is not there. If the Appellate Courts below are correct, then all daily newspapers, except those published in the very large cities, would be exempt, a result never intended by Congress or justified by the statutory language.

This Court, when dealing with cases under the Fair Labor Act, have said nothing to justify the Appellate Division in holding that the doctrine of *de minimis* was applicable.

On the contrary, it has in effect said otherwise.

In *United States v. Darby*, 312 U. S. 100, this Court stated (p. 123):

"Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipment in the commerce or of production for commerce for any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong., 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts."

In *Warren-Bradshaw Drilling Company v. Hall*, 317 U. S. 88, pages 91, 92, in holding coverage under the Act:

"The evidence supports the finding that *some of the oil* produced ultimately found its way into interstate commerce." (Italics ours.)

In *Kirschbaum v. Walling*, 316 U. S. 517, page 521, it is stated:

"Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, *if isolated, are only local.*" (Italics ours.)

Under the facts of this case it can scarcely be said that the respondent isolated itself from the channels of interstate commerce.

This Court when dealing generally with the subject of Interstate Commerce have recently clearly repudiated the narrow and unrealistic view of the Appellate Division.

In *Western Union Telegraph Company v. Lenroot*, 323 U. S. 490, 8 WHR 58, the Court stated:

"It was long ago settled that telegraph lines when extending through different states are instruments of commerce and messages passing over them are a part of commerce itself. *Western Union Telegraph Co. v. James*, 162 U. S. 650, 654. That 'ideas, wishes, orders and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage has also been held. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 356; cf. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 128 (1 LRR Man. 732). It is unnecessary to decide whether electric impulses into which the words of the message are transformed are 'goods' within the Act (cf. *Utah Power*

& *Light Co. v. Pfost*, 286 U. S. 165; *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650; *Electric Bond & Share Co. v. Securities & Exchange Comm.*, 303 U. S. 419), since the complaint is not based on 'shipment' of impulses as 'goods' but only of messages. We think telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act, as alleged in the complaint."

In *United States of America v. South-eastern Underwriters*, 322 U. S. 533, at page 549, it is stated:

"Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, * * *."

The Appellate Division was therefore in error in applying the *de minimis* doctrine upon the basis of anything this Court may have said.

They were also in error under the language of the Act, its legislative history and the interpretations of the Wage and Hours Administration in administering the Act.

(2)

Legislative History.

The legislative history also supports the view that Congress intended the Act to apply to newspapers of the size and kind here involved and that the amount of de-

fendant's extrastate distribution was clearly not *de minimis* in the eyes of Congress. In the course of the congressional discussions of the meaning and extent of commerce, Senator Glass propounded the question whether he was engaging in commerce, if he owned a newspaper, for example, of 20,000 subscribers which distributed its entire output in Virginia except for 10 copies sent to extrastate subscribers. Senator Borah, who was suggested as the constitutional authority most qualified to answer, stated as follows:

"Mr. President, if the Senator is purchasing his goods for the purpose of making up his newspaper in different States and he takes them to a particular place where he uses them, and he transmits his newspapers into other States, I do not think the number—the number, 10 or 20 or 30—is controlling. I think the Senator is engaged in interstate commerce" (83 Cong. Rec., Part 8, p. 9172).

The same opinion was expressed by Mr. Justice Jackson (then Assistant Attorney General) in his testimony before the joint committee of Congress, as evidenced by the following colloquy (Joint Hearings, pt. 1, pp. 81-82):

"Representative Connery. Now, what about the newspaper business? Would the editorial staff and the printers in the newspaper establishment itself—would they come under this, and how far do these go down?

To the newsboys, or what?

Mr. Jackson: If the newspaper moves in interstate commerce, the persons who were engaged in its production would come under the act.

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Representative Connery: Suppose the Boston Post ships up into New Hampshire. They do.

Mr. Jackson: When it crosses the line, it is an act of interstate commerce.

Representative Connery: How would that affect the employees?

Mr. Jackson: That would affect the employees just as any others would be affected by this act.

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Representative Connery: But you would say that these Boston Post linotype operators, the men who were engaged in actually getting out the paper, printing the paper, with the machines and all, would be in it?

Mr. Jackson: I think they would."

In view of these expressions of opinion and the specific consideration of the question during the debates, the final adoption of the small newspaper exemption in Section 13 (a) (8) manifests the congressional purpose to cover all such newspapers not exempted by its express terms.

(3)

Expressions of the Wage and Hour Administrator.

In the first Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, for the Calendar Year 1939, it is stated (p. 18):

"Where an employee produces any goods for interstate commerce the act makes no distinction as to the percentage of his employer's goods, or of the goods upon which he himself works, that move in interstate commerce. Congress clearly evidenced its intention to bar from interstate commerce all

goods produced in violation of the labor standards prescribed in the act. In section 15 (a) (1) of the act, the 'hot goods' provision, Congress made it unlawful for any person

(1) To transport or offer for transportation, ship, deliver, or sell in commerce or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, *any goods* in the production of which any employee was employed in violation of section 6 or section 7. (Italics added.)

The phrase 'any goods' clearly shows that the coverage of the act does not depend upon the amount or percentage of the employer's goods, or of the goods upon which the particular employee works, that move in interstate commerce."

In Interpretative Bulletin *No. 5 (to be submitted to Court), at page 5, it is stated:

"9. Where an employee is engaged in the production of any goods for interstate commerce, the act makes no distinction as to the percentage of his employer's goods or of the goods upon which he works that move in interstate commerce. The entire legislative history of the act leads to the conclusion that Congress intended to exclude from the channels of interstate commerce all goods produced under labor conditions detrimental to the

*This Court said as to interpretative bulletins in *United States v. American Trucking Association*, 310 U. S. 534, at page 549:

"In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

health, efficiency, and general well-being of workers. The President's message advocating the passage of wage and hour legislation stated that 'goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.' The Congress expressly found in section 2 (a) (1) that the production of goods under labor conditions detrimental to health, efficiency, and general well-being of workers 'causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States.' The reference in section 15 (a) (1) to 'any goods' is convincing proof of this intent of Congress to make no distinction as to the percentage of goods which move in interstate commerce. That section makes it unlawful for any person '(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which *any* employee was employed in violation of section 6 or section 7.'

Thus, there is no justification for determining the applicability of the act to a particular employee on the basis of the percentage of the goods he produces, or of his employer's goods, which move in interstate commerce." (Italics ours.)

In Defendant's Exhibit A, which is a study by the United States Department of Labor, Wage and Hour Division, Economics Branch, entitled "Small Daily News papers under the Fair Labor Standards Act" (June 1942), at page 67, it is stated:

"The Wage and Hour Division has generally held that employees of small newspapers, when not specifically exempted by the language of Section 13(a) (8) of the Act, are covered by the wage and hour provisions of the law if they aid in the flow of interstate commerce to the paper or if they help to produce a paper or job work which goes outside the state or leads to a flow of commerce across state boundaries.¹ This interpretation has been applied to small newspapers as well as large ones, and almost all newspaper employees not specifically exempted have, in short, been held to be covered."

At page 62 of said Study, it is stated:

"Circulation.

Small daily papers ship varying, but usually small, percentages of their circulations outside of the state of publication.² Information respecting the details of distribution has been obtained in Pennsylvania and from the Iowa Press Association.

The percentage of out-of-state distribution among small dailies in Pennsylvania, including the distribution of unpaid copies to advertisers, varied from less than 0.8 percent. to 9 per cent., as shown in Table 9."

The Wage and Hour Division in investigations also sampled the daily newspapers in Pennsylvania (Study, p. 62) and observed that the circulation of the average small daily newspaper in that state varied from .8% to

1. Wage and Hour Division, press releases, July 14, 1939, and August 13, 1941.

2. The position of the Wage and Hour Division regarding the relation of out-of-state circulation to coverage has been that the percentage of out-of-state shipment is of little importance; that coverage depends on the existence of any shipments rather than upon the extent of shipments.

9%. On a percentage basis the respondent's circulation amounted to about .5% of the number of papers produced. The Study continues (p. 64):

"While the percentages of out-of-state circulation among small newspapers are very small, they are not materially different from the percentages of out-of-state circulations of the larger papers. All newspapers, regardless of circulation size or the size of the towns or cities in which they are published, are directed at the local reading markets, and the bulk of their circulation is likely to be local."

Nevertheless, the Administrator ~~concluded~~ that the small dailies were covered by the Act.

The respondent's activities meet every test of interstate commerce and coverage under the Act as the survey of the small daily newspapers made by the Wage and Hour Administrator shows.

On pages 55-66 of the above summary, the administrator outlined what he observed as to the interstate characteristics of the small daily newspapers:

A. *General* (page 56) Under this heading the Administrator observed as to small newspapers:

"Its place in the national economy can very well be regarded as that of an essential agency of communication, at the same time that is a productive enterprise similar to any other factory operation."

B. *Space Content* (page 57).

1. *News.* The Administrator observes that the local news of the small daily newspaper is about 90% and the news from out-of-state sources is about 10%. The re-

spondent had about the same proportion. Most daily newspapers, the Administrator observed, depended for their source of this 10% out-of-state coverage upon either Associated Press, United Press, or International News Service as did the respondent.

2. *Features* (page 60). The small daily newspaper used the same type of syndicated features and mats as the respondent did.

3. *Advertising Mat Services* (page 60). The respondent just as the other small daily newspapers, as the Administrator observed, used advertising mat services and carried national advertising. The national advertising of the respondent was about the same proportion as other daily newspapers of the same size.

C. *Circulation* (page 62).

Since the Court below relied solely upon the amount of extrastate circulation to determine coverage, it is well to quote in full what the Administrator found as to a typical small daily newspaper:

"C. *Circulation*.

Small daily papers ship varying, but usually small, percentages of their circulations outside of the state of publication.² Information respecting the details of distribution has been obtained in Pennsylvania and from the Iowa Press Association.

The percentage of out-of-state distribution among small dailies in Pennsylvania, including the dis-

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tribution of unpaid copies to advertisers, varied from less than 0.8 per cent. to 9 per cent., as shown in Table 9."

At page 64 of said Study, it is stated:

"While the percentages of out-of-state circulation among small newspapers are very small, they are not materially different from the percentages of out-of-state circulations of the larger papers. All newspapers, regardless of circulation size or the size of the towns or cities in which they are published, are directed at the local reading markets, and the bulk of their circulation is likely to be local."

D. *Materials* (page 64).

The Wage and Hour Administrator also observed that daily newspapers, both large and small, depended upon out-of-state sources for newsprint, ink, type metal and machine parts. The respondent was no exception to this rule.

E. *Summary* (page 66).

"While the point of view and circulation of the small paper are essentially local, the typical small paper has sufficient interstate connections and depends to so large an extent upon the channels of interstate commerce and communication that any picturization of it as a 'strictly local enterprise' is misleading. From the foregoing discussion of the interstate aspects of the operation of small newspapers it is apparent that no newspaper, however local its editorial and advertising policies may be, functions without important reliance upon the ma-

terial resources and intelligence of the world outside the boundaries of its own county and its own state. This is no less true of small newspapers than of large papers, especially in the daily field, where papers of all circulation sizes have come, in recent years, to be more and more alike."

The Appellate Division therefore was not justified in deciding that the "*de minimis*" doctrine applied under the Act.

POINT III.

The doctrine of "*de minimis*" is inapplicable under the facts and controlling decisions in the Federal Courts which decisions the court below refused to follow.

Even if the "*de minimis*" theory were applicable to cases arising under this Act, that theory could not apply to the case at bar because the out of State activities held insufficient by the Appellate Division were not casual, occasional or isolated acts but formed a part of a daily, continuous practice repeated every day of every week of every year the paper was published.

The Appellate Division applied the doctrine of "*de minimis*" to the law and the facts of the instant case. As we have discussed, *supra*, they did not think that the interstate connections of the respondent or the receipt of cuts and materials from extrastate sources brought the respondent within Interstate Commerce under the act (R. 101). They could not, however, deny that the shipping of the newspapers to other states was an act of Interstate Commerce under the act, but they refused coverage holding this out of state circulation "insignificant" or "inconsequential" or an "inconsequential inci-

dent" and that respondent's "interstate business was not regular but casual; not an integral, but only an incidental part of its essential local business" (R., 99-100). In this assumption they were in error under the law and under the facts.

The Federal Courts, in dealing with newspapers have been unanimous in rejecting the "*de minimis*" doctrine.

In the following cases, the facts were strikingly similar to the case at bar. The amount of newspapers sent outside the State was a small portion of the daily production. It was, however, a daily, week in and week out, year in and year out occurrence as happened in the case at bar.

In *Walling v. Oklahoma Press Publishing Company, supra*, the District Judge wrote in holding the employees under the Act:

"Since June 1, 1939, no papers have been sold by the Company to persons outside the State of Oklahoma, unless it might be said that the sending of papers to out-of-state advertisers constitutes a sale, although no sum is paid for the papers as such. The Company mailed, without charge, to former Muskogee residents in the armed forces approximately 120 copies of the Muskogee Daily Phoenix, and approximately 17 copies of the Muskogee Times-Democrat. The Company also mails to its out-of-state representative for advertisers a copy of each paper for each foreign advertiser. The number of papers so sent is approximately 67 daily."

In *Sun Publishing Company v. Walling, supra*, the Circuit Court said where 200 copies out of 9,000 were sold outside the state:

"Likewise it is unimportant that only a small percentage of appellant's newspapers are sent out of the state. *U. S. v. Darby*, 312 U. S. 100 (1 WH cases 17); *Chapman v. Home Ice Co.*, 136 F. 2d 353 (6 WHR 570) (C. C. A. 6). The Act, by its terms, is applicable to newspapers generally because by its express terms it exempts weeklies and semi-weeklies and those with circulations less than 3,000."

In *Fleming v. Lowell*, *supra*, the District Judge observed:

"The respondent contends, in resisting the order sought, that the Administrator is without jurisdiction over the respondent's affairs because of the infinitesimal amount of respondent's circulation that crosses the state lines.

"In support of this contention the respondent argues that more than 98% of its total average daily circulation is distributed entirely within the Commonwealth of Massachusetts. To be sure, the Congress in passing the Act was exercising its power to regulate commerce to correct and eliminate the conditions referred to in its findings set out in Section 2 (a) of the Act. However, the percentage or number of newspapers of the respondent that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states."

The Appellate Division below sought to distinguish this case by stating (R., p. 560):

"Respondents also rely on *Fleming v. Lowell Sun Co.* (36 F. Supp. 329; reversed on other grounds,

120 F. 2d 213, and affd. by an equally divided court, 315 U. S. 784). That case, so far as material, is authority only for the proposition that a large newspaper is engaged in interstate commerce. (See *Schroepfer v. A. S. Abell Co.*, *supra*, p. 115.)"

The Wage and Hour Administrator has expressly denied any such distinction. Defendant's Exhibit A, at page 67.

The Appellate Division in invoking the "*de minimis*" doctrine did so on the authority of *National Labor Relations Board v. Feinblatt*, *supra*, heretofore discussed and *Zehring v. Brown Material Co.*, 48 F. Supp. 740 (S. D. Calif.) and *Goldberg v. Worman*, 37 F. Supp. 778 (D. C. Fla.).

The latter two cases, besides being contrary to the overwhelming weight of authority in the Federal Courts are clearly distinguishable under their facts. For instance in *Goldberg v. Worman*, the extra state shipments were "a matter of accommodation." While in the *Zehring* case, the employees in question were repairmen held not engaged in Interstate Commerce and the employer was held exempt as a retail establishment. Neither of these cases were "newspaper" cases.

Furthermore, in the *Goldberg* case the employee was in the exempt category since the employer was a "retail" establishment and the employee's "greater part of . . . selling (was) in interstate commerce (Act Sec. 13 [a] 2)."

The following cases, though not newspaper cases discussed and rejected the "*de minimis*" theory.

McKeown v. Southern California, 52 Fed. Supp. 331, 6 WHR 1016, affd. April 21, 1945, 8 WHR 482, 148 Fed. 2nd 891;
In Ling, et al. v. Currier Lumber Co., 6 WHR 401, 50 Fed. Supp. 204;

- Drake v. Hirsch*, 40 Fed. Sup. 290, 1 WHC 702,
U. S. D. C. N. D. Georgia;
- Muldowney v. Seaberg Elevator Co.*, 39 Fed.
Supp. 275, 1 WHC 605, U. S. D. C. E. D. New
York;
- Nelson v. Southern Ice Co.*, U. S. D. C. N. D.
Texas, 1 WHC 787;
- Strand v. Garden Valley Telephone Co.*, 6 WHR
1087, U. S. D. C. District of Minnesota;
- Elmore v. Cromer & Beaty Co., Inc.*, 6 WHR 861,
U. S. D. C. W. D. South Carolina, August 2,
1943;
- Philips v. Star Overall Dry Cleaning Co.*, 7 WHR
92, U. S. D. C. S. D. New York, January 6,
1944;
- Dorner v. Iaco Clothes, Inc.*, 7 WHR 35, U. S. D.
C. N. D. Illinois;
- Walling, etc. v. Partee, et al.*, 6 WHR 863, U. S.
D. C. Tennessee;
- Walling v. Oklahoma*, 7 WHR 655, U. S. D. C. E.
D. Oklahoma;
- Wood v. Central Sand & Gravel Co.*, 33 Fed.
Supp. 40, 1 WHC 326;
- Chapman v. Home Ice Co.*, 136 Fed. 2d 353 (CCA
6), cert. den. 320 U. S. 761;
- Schmidt v. The Peoples Telephone Union of
Maryland*, 138 Fed. 2d 13 (CCA 8);
- Davis v. The Goodman Lumber Co.*, 133 Fed. 2d
52 (CCA 4).

We are just referring to two of them since they seem to illustrate the principle for which we are contending that distinguishes the case at bar from the isolated minority view of the Appellate Division.

In *Ling v. Currier Lumber Co.*, *supra*, the District Judge presiding, in referring to *United States v. Darby*,

supra, wherein this Court noted that Congress "has made no distinction as to the volume or amount of shipments," stated (p. 208):

"Therein lies the distinction and in our opinion it is now generally accepted that when even less than one per cent of one's business is in interstate commerce, that business is subject to the Fair Labor Standards Act, unless that 'less than one per cent' was a casual or isolated sale."

Also District Judge J. T. O'Connor in *McKeown v. Southern California*, 52 Fed. Supp. 331, affd. 148 Fed. 2nd 891, 6 WHR 1016, in refusing to apply the "*de minimis*" doctrine under the Act where the interstate activity, as small as it might be, was a regular every-day and every-week occurrence and not casual or spasmodic, stated (p. 333):

"The activities of the plaintiff, under the facts, were not casual nor spasmodic, but rather a continuous, regular and integral part of his everyday and every week business, partaking of an interstate character. Withholding recognition of these salient factors would be interpolating language into the Act which was not intended by Congress nor observed by the cases construing the statute. It is the opinion of this court that the rule *de minimis* is not applicable in view of the decisions cited and the stipulation submitted."

Also at page 331:

"An examination of the Act negatives any delimitation upon the percentage of the employee's activities in order to preclude or avail himself of its benefits."

This Court had an opportunity to approve the invoking of the doctrine of "*de minimis*" when the daily newspaper publisher in *Sun Publishing Co. v. Walling*, 140 Fed. 2nd 445, applied for certiorari, denying coverage under the Act under such doctrine and urging the authorities relied upon by the Appellate Division and included the case at bar then before the New York Court of Appeals (see petition of Sun Publishing Co., pp. 22 to 24 dated March 18, 1944). This court denied certiorari, 322 U. S. 728.

The doctrine that each State Court could fix the amount and type of commerce requisite before there would be coverage under the Act would defeat the very purpose of Congress to insure that the Act would have the broadest coverage and reach the farthest channels of commerce. The result would be that each of the 48 State Courts, under the guise of the "*de minimis*" doctrine, would set the standard as to how much and what kind of commerce was necessary to be present in its state before the Federal Act could apply. Employers would be tempted to split up their units and by keeping within the prescribed minimum range of activity could escape coverage of the Act and thereby deny the employees the benefit of it. This doctrine, if permitted to stand, would have the effect of excluding virtually all the employees of all small daily newspapers throughout the country and probably many other groups of labor not now under consideration.

To permit each of the State Courts to determine the coverage of a Federal statute upon the theories relied upon in the New York Appellate Courts below, is a dangerous precedent and one that would in all probability lead to the escape in the aggregate of large groups of concerns whose employees the Congress intended to be benefited by the Act.

Conclusion.

The judgment of the New York Court of Appeals should be reversed and the recoveries obtained by the petitioners at Trial Term should be ordered reinstated with costs, interest and reasonable counsel fees* for services rendered before the Appellate Division, Court of Appeals and this Court.

Respectfully submitted,

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*The Trial Court awarded \$1,000.00 counsel fees (R. 23). Under the Act (Sec. 16 [b]), and *Greenberg, etc. v. Arsenal Building Corp.*, 144 Fed. 2nd 292, the Appellate Court may award additional fees for services rendered in reviewing a judgment appealed from.

APPENDIX.**FINDING AND DECLARATION OF POLICY.**

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS.

SEC. 3. As used in this Act—

• • • • •

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

• • • • •

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

.

EXEMPTIONS.

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a *bona fide* executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the matching, taking, harvesting, cultivating, or farming of any of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of naimal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating,

processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.¹

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PROHIBITED ACTS.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods

in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any

1. Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress. 53 Stat. 1266).

regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carriers, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

• • • • •

PENALTIES.

SEC. 16. (a) Any person who wilfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees, similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

• • • • •

NOV 26 1945

Supreme Court of the United States

COURTNEY M. MABEE, CHARLES K. BARNUM, ED-
WARD G. TOMPKINS, NORTON MOCKRIDGE,
GEORGE S. TROW and WILLIAM L. O'DONOVAN,
Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent.

PETITIONERS' REPLY BRIEF.

MORTON LEXOW,

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Suffern, N. Y.

DAVID H. MOSES,

STEPHEN R. J. ROACH,

On the Brief.

Cases Cited.

Schroepfer v. A. S. Abel Co., 138 Fed. 2nd 111 3
Walling v. Jacksonville Paper Co., 317 U. S. 564 3

Supreme Court of the United States

COURTNEY M. MABEE, CHARLES K. BAR-
NUM, EDWARD G. TOMPKINS, NORTON
MOCKRIDGE, GEORGE S. TROW and WILL-
IAM L. O'DONOVAN,

Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY,
Inc.,

Respondent.

PETITIONERS' REPLY BRIEF.

The respondent, White Plains Publishing Company, Inc., in its brief has enlarged the questions beyond that included in the petition for certiorari.

The petitioners, in applying to the Court for certiorari, presented only the following questions for review (Petition for Certiorari, p. 14).

"1. Was the respondent* engaged in interstate commerce, or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938 during the period alleged in the complaint?

"2. Was the Court below correct in refusing to consider all the interstate activity of the respondent proved except the actual mailing of the product each day to the 45 out-of-state subscribers in determining the question of interstate commerce?

"3. Was the doctrine of *de minimis non curat lex* applicable under the Fair Labor Standards Act and under the facts of this case?"

* "If the respondent is held so engaged then each employee engaged in that process or in production of goods for such commerce is so engaged. *Kirschbaum v. Walling*, 316 U. S. 517."

The respondent advances the following points in its brief before this Court:

"Point I. Respondent was not engaged in commerce or in the production of goods for commerce and none of petitioners was engaged in commerce or in any process or occupation necessary to the production of goods for commerce.

"Point II. No credence should be given to petitioners' claims which bear every earmark of an afterthought manufacture for the occasion.

"Point III. The recoveries granted by the Trial Court should not be reinstated because the computation of overtime was incorrect.

"Point IV. The Act contains a particular form abridgment of the constitutional guaranty of a free press.

"Point V. Application of Sections 6 and 7 of the Act to respondent's business would constitute an unreasonable, arbitrary and injurious discrimination against respondent in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution, in conflict with the principles announced in *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).

"Point VI. Petitioners were exempt from the provisions of the Act herein as professional employees within the meaning of Section 13 (a) (1)."

Since only Point I urged by the respondent is to be reviewed by this Court under the writ granted, we shall briefly reply thereto.

On page 16 of its brief the respondent states:

"The record is undisputed that in the publication of a daily newspaper no news stories or features are disseminated to readers exactly as they reach the office."

This statement evidently was made in support of respondent's contention that the news items or features received by the respondent newspaper came to a rest after their interstate journey and that a new article thereafter was sent into commerce. The record, however, is not in agreement with the respondent's statement (Testimony of Walter V. Hogan, Editor and an Executive Officer of the Respondent, R., p. 71).

"Q. The news stories, as you take them off the teletype machine, do you print them as you take them off in the same form? A. Practically.

"Q. Are there some stories that are taken off and changed? A. Occasionally.

"Q. They are headed? A. Some.

"Q. Headed? A. Yes."

It is the petitioners' contention that whatever pause occurred in the transmission of the news items or features from the interstate sources to the reader, such pause was temporary and under the doctrine of *Walling v. Jacksonville Paper Company*, 317 U. S. 564, a temporary pause does not mean that they are no longer "in commerce" within the meaning of the Act (see Petitioners' main brief, p. 16).

On page 18 of its brief the respondent quotes from *Schroepfer against A. S. Abel Co.*, 138 Fed. 2nd 111, cert. denied January 17th, 1944, and disputes the petitioners' contention that coverage was denied in that case because the employees therein involved were not employees of the newspaper in question. The respondent continues to state that the Circuit Court, even assuming the petitioners there were employees of the newspaper, held they were not engaged in commerce when they sold the paper on the streets of Baltimore. What the Circuit Court actually said in this respect is as follows (p. 112):

"Whether upon these facts plaintiffs were employees of defendant within the meaning of the Act, is a question not free from difficulty (Cf. *Southern R. Co. v. Black*, 4 Cir. 127 F. 2d 290 [5 WHR 298]), but it is one which it is not necessary for us to decide, since we are of opinion that, even if considered employees of defendant, plaintiffs were not engaged in commerce within the meaning of the Act. *They had nothing to do with collecting news, assembling it, printing the paper, or any other activity in which interstate commerce was involved. Their only duties related to the retail sale of papers, or delivery thereof for retail sale, in the City of Baltimore.*" (Italics ours.)

On the contrary, the petitioners in the case at bar had everything to do with collecting news, assembling it and printing the papers and the other activities in which interstate commerce was involved.

The respondent's Point II is as follows:

"No credence should be given to petitioners' claims which bear every earmark of an afterthought manufacture for the occasion."

No reply to this point is necessary since it is not at issue for review before this Court. However, the Trial Court, who heard the case without a jury, with the consent of all parties, found that the petitioners' claim was "sustained by credible evidence" (R. 89), and that "evidence upon the trial established that each of the plaintiffs was employed in producing and working on such goods in a process and occupation necessary to the production thereof, • • •" (R. 89).

The Trial Court resolved the question of credibility against the respondent (R. 91), concluding (R. 92) "in the absence of substantial or detailed contradictory evidence the Court must and does find by a fair prepon-

derance of the believable evidence that the plaintiffs did perform services for the defendant beyond the prescribed hours of designated work weeks and that the minimum overtime hours as claimed were actually spent in the course of their employment."

The respondent urges as Point III:

"The recoveries granted by the Trial Court should not be reinstated because the computation of overtime was incorrect."

This issue is not before the Court. However the application of the rule in *Brooklyn Savings Bank against O'Neill* and *Overnight Transportation Co. against Missell*, can be adequately handled by the Courts below when the case is remanded to them to proceed according to the opinion of this Court.

The respondent urges as Points IV and V:

"The Act Contains a Particular Form of Abridgment of the Constitutional Guaranty of a Free Press."

"Application of Sections 6 and 7 of the Act to respondent's business would constitute an unreasonable, arbitrary and injurious discrimination against respondent in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution, in conflict with the principles announced in *Grosjean v. American Press Co.*, *supra*."

These issues were not determined by the Appellate Courts below and hence cannot be raised in this Court. However, they have been answered in this Court by the Administrator of the Wage and Hour Division of the Department of Labor in Nos. 61 and 63 this term (*Oklahoma Press Publishing Co., etc.*) and we repeat the Administrator's argument (pp. 42-45):

"It is well settled by the decisions of this Court that the press as such is not immune from

the application of general laws. In the light of the opinions of all the Justices in *Associated Press v. United States*, Nos. 57, 58, 59, October Term, 1944, confirming the view which was taken in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, repetition of the argument in support of this proposition is superfluous.

"Petitioners [respondents here] argue that application of the Fair Labor Standards Act to newspapers will increase their cost of doing business and hence amounts to a restriction of freedom of the press. The fact that the cost of doing business is increased by application of the Act no more infringes the guaranty of the First Amendment than does the increased cost of doing business which is entailed by the imposition of property and income taxes upon newspapers. The freedom of the press is not abridged by protection of the employees of newspapers from working under substandard labor conditions. The First Amendment is not a guaranty of profits. The regulation here does not 'trespass upon the domains set apart for free speech' (*Thomas v. Collins*, 323 U. S. 516, 532) any more than do safety and sanitary laws, zoning ordinances, or wartime allocation and priority controls. There is here no attempt at a 'guardianship of the public mind' such as was involved in *Largent v. Texas*, 318 U. S. 418, or any form of censorship or previous restraint of discussion condemned in *Bridges v. California*, 314 U. S. 252; *Cantwell v. Connecticut*, 310 U. S. 296; *Thornhill v. Alabama*, 310 U. S. 88; *Schneider v. State*, 308 U. S. 147; *Hague v. C. I. O.*, 307 U. S. 496; *Lovell v. Griffin*, 303 U. S. 444; or *Near v. Minnesota*, 283 U. S. 697.

"Even though freedom of the press is 'in a preferred position' (*Murdock v. Pennsylvania*, 319 U. S. 105, 115; *Follett v. McCormick*, 321 U. S. 573), the press is not free from all regulatory measures. Although a license tax on the right to distribute books and pamphlets may be invalid as a direct

restriction of circulation and as a restraint equally obnoxious to that imposed by censorship or previous restraint, the Fair Labor Standards Act is neither a tax nor a direct restraint. The preferred position to which the press is entitled is based on its function as a medium of public information. Insofar as a newspaper is a business for profit it is not entitled to immunity from the public policies applicable to other businesses, such as those embodied in the National Labor Relations Act and the Fair Labor Standards Act.

"The final argument that the exemption of certain weekly newspapers of local circulation by Section 13 (a) (8) of the Act is a discriminatory classification which invalidates the application of Sections 6 and 7 to the petitioners [respondents here] is plainly without substance. This Court has pointed out time and again that the Fifth Amendment does not require the full and uniform exercise of the commerce power and that Congress may weigh relative needs and limit the application of particular legislative policies. *Steward Mach. Co. v. Davis*, 301 U. S. 548; *Curran v. Wallace*, 306 U. S. 1. See also *Sun Publishing Co. v. Walling*, 140 F. 2d 445, 448 (C. C. A. 6), certiorari denied, 322 U. S. 728. The discriminatory tax involved in *Grosjean v. American Press*, 297 U. S. 233, 250-251, was held invalid because it was found to be a 'deliberate and calculated device' to penalize 'a selected group of newspapers.' This Court has never suggested that either the First or the Fifth Amendment requires Congress to regulate or tax all sources of public information alike or not at all."

The respondent, as its last point urges:

"Petitioners were exempt from the provisions of the Act herein as professional employees within the meaning of Section 13 (a) (1)."

This question is not before this Court and was decided against the respondent by the Trial Court (R. 92) and not reviewed by either the Appellate Division or the Court of Appeals since they did not reach the question of defenses, having found initially that neither the petitioners nor the respondent were engaged in commerce within the meaning of the Act.

The respondent on page 5 of its brief repeats the spurious argument made to the New York Court of Appeals, to wit:

"The judgment when reduced to dollars and cents imposed a burden of 1.12½ on each copy of respondent's newspaper sent outside of the State of New York during the period in controversy whereas the price actually paid by subscribers for those newspapers was 2¢ per copy."

It is well known that newspapers do not depend upon the price paid for a copy for support of the enterprise, nor is the respondent correct, as a matter of bookkeeping, in attempting to charge each out of state copy with a pro rated amount. The basis costs of a newspaper are the same whether one copy or ten thousand copies are printed and there is very little added to this basic cost by the increase in the number of copies. And as the Wage and Hour Administrator has observed (Defendant's Exhibit A, R. 88, p. 11 thereof), the bulk of the income of a daily newspaper is from advertising (about 75%).

Hence, the above argument of the respondent proves nothing.

It is, therefore, respectfully submitted that the judgment of the New York Appellate Courts below be re-

versed and that the relief as prayed for in the petitioners' main brief be granted.

Respectfully submitted,

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DAVID H. MOSES,
STEPHEN R. J. ROACH,
On the brief.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1152

57

COURTNEY M. MABEE, CHARLES K. BARNUM, ED-
WARD G. TOMPKINS, NORTON MOCKRIDGE,
GEORGE S. TROW AND WILLIAM L. O'DONOVAN,
Petitioners,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent

MEMORANDUM FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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**COURTNEY M. MABEE, CHARLES K. BARNUM, ED-
WARD G. TOMPKINS, NORTON MOCKRIDGE,
GEORGE S. TROW AND WILLIAM L. O'DONOVAN,**

Petitioners,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC.,

Respondent

MEMORANDUM FOR RESPONDENT

This memorandum will be devoted both to the Motion to Dispense with Reprinting Record on Certiorari and with the Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the Trial Term, Supreme Court, Westchester County, is reported at 180 Misc. 8, 41 N. Y. S. 2d 534 (R. 535-541).

The opinion of the Appellate Division of the Supreme Court for the Second Judicial Department is reported at 267 A. D. 284, 45 N. Y. S. 2d 479 (R. 551-561).

The decision of the Court of Appeals of New York affirming the Appellate Division's reversal of the Trial Term is reported at 293 N. Y. 781.

The order of the Court of Appeals amending the remittitur appears in the record at page 547. It has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals of New York was entered on November 16, 1944. The remittitur of the Court of Appeals was amended on March 9, 1945. Between the entry of the judgment and the amendment of the remittitur petitioners obtained an order from Associate Justice Jackson of this Court extending their time to apply for a writ of certiorari sixty days from February 12, 1945. Petitioners filed their petition for a writ of certiorari on April 12, 1945, invoking the jurisdiction of this Court under Section 237 (b) of the Judicial Code, as amended, by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in view of the determination by the highest court of the State of New York that respondent was not engaged in interstate commerce and that petitioners were not engaged in any process or occupation necessary to the production of goods in interstate commerce within the meaning of the Fair Labor Standards Act of 1938, this Court should review that decision.¹

¹ Respondent herein cannot agree with the jurisdictional statement of petitioners or with the statement of the federal question involved as elaborated by petitioners in their petition. The proceeding was originally instituted by petitioners, one of whom was City Editor and for a period of months acting Editor of respondent, another of whom was first Assistant Editor and later Sports Editor of respondent's newspaper and the other four of whom were reporters covering various local assignments. Petitioners started suit on September 14, 1942, or more than 18 months after respondent had gone out of business.

The record is undisputed that the sole purpose of respondent's newspaper was to serve the citizens of White Plains and the immediate adja-

STATUTE INVOLVED

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*). This statute is set forth in the Appendix at page 25.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 3 and the First and Fifth Amendments to the Constitution of the United States. Those provisions are set forth in the Appendix at page 22.

STATEMENT OF THE CASE

Petitioners started suit on September 14, 1942, in the Supreme Court of the State of New York, Westchester County, to recover overtime compensation claimed to be due under the provisions of the Fair Labor Standards Act of 1938. Respondent for many years prior to February 28, 1941, had been publisher of an evening newspaper, known as The White Plains Daily Reporter, published each weekday evening, except Sunday and certain specified holidays, throughout the year. The newspaper suspended publication on February 28, 1941.

cent area in Westchester County, New York (R. 372). The record further shows that the circulation of respondent's newspaper during the period in controversy ranged from 9,500 to 11,000 copies a day; that at no time did it ever send on any one day more than 45 copies of its publication outside of the State of New York, these few copies going to residents of White Plains temporarily away on vacation or at school or in the armed forces (R. 64-66). The record is uncontradicted that respondent had no desire to sell its newspaper outside of the area consisting of White Plains and adjacent Westchester County (R. 372); it did not even attempt to cover the whole County or serve residents in Westchester County who were closer to other cities such as Yonkers, Mount Vernon and New Rochelle (R. 445).

In addition to the questions presented to this Court by petitioners, other questions were submitted to the Trial Court, to the Appellate Divi-

Following the filing of the complaint in the Trial Court respondent moved to dismiss under Rule 106 of the Rules of Civil Practice of New York on the ground that the complaint did not state facts sufficient to constitute a cause of action and also for an order dismissing the complaint under Rule 107 on the ground that the court had no jurisdiction over the subject matter of the action for the reasons that (a) the Act under which the claims were alleged to have arisen is not a statute which can be applied to the business of respondent by reason of the provisions of Article I, Section 8, Clause 3 (the commerce clause) and the First Amendment to the Constitution of the United States, and (b) the Act violates the rights of respondent as guaranteed by the Fifth Amendment to the Constitution of the United States. The motion was denied.

Subsequently all of the petitioners filed an amended complaint, answer to which was filed by respondent. When

sion and to the Court of Appeals. Each of those questions was passed upon adversely to respondent herein in the Trial Court. The Appellate Division in its order reversing the Trial Court's judgment stated that in view of its determination that respondent was not engaged in interstate commerce and that petitioners were not engaged in any process or occupation necessary to the production of goods in interstate commerce within the meaning of the Act, it was unnecessary to discuss the other questions raised. The Appellate Division, however, observed that the award made to each of petitioners by the Trial Judge was excessive in its method of computation of overtime compensation. It reversed the Trial Court on the law and the facts and dismissed the complaint on the law.

Among the other questions presented on appeal from the judgment of the Trial Court to the Appellate Division were:

(1) Whether Congress, in the light of the prohibition in the first Amendment against the abridgment of the freedom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of respondent.

(2) Whether Congress has the power under the commerce clause of the Constitution to apply the Act to respondent's newspaper publishing business.

(3) Whether, in view of the provisions of the First and Fifth Amendments, Congress has the power to regulate the business of the press by

petitioners rested during trial, respondent moved to dismiss for failure of proof which motion was denied. Petitioners moved to have the pleadings conformed to the proof and over objection this motion was granted. Respondent then renewed its motions on the statutory and constitutional grounds which were denied, and petitioners moved for judgment on the pleadings.

The Trial Court rendered judgment in favor of each of the petitioners for their claimed overtime compensation in a sum for each computed to include (a) the amount of claimed overtime at the rate of one and one-half times the regular rate at which each petitioner was employed, "regular rate" being construed by the Trial Court to be the employee's weekly salary divided by forty hours, *plus interest*, plus an additional equal amount as liquidated damages, and

classifying the press on the basis of volume of circulation, frequency of issue and area of distribution in such a manner as to exempt more than 72 per cent of the total number of newspapers from the burdens of the Act, while subjecting all others engaged in the same business to those burdens.

(4) Whether petitioners sustained the burden of establishing the fact of overtime work and also the quantity of overtime work each week in the light of the record evidence that their claims bore every earmark of an afterthought manufactured for the occasion to which no credence should be given.

(5) Whether petitioners' method of computation conforms to the provisions of Section 7 of the Act as interpreted by this Court.

(6) Whether petitioners or any of them were professional employees and therefore exempt from the provisions of the Act.

The Court of Appeals of New York affirmed the order of the Appellate Division in toto. If this case is to be reviewed by this Court, respondent respectfully submits that all of the points presented below should be considered. *Donoran v. Pennsylvania Co.*, 199 U. S. 279, 292 (1905); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 567 (1931); *Cole v. Ralph*, 252 U. S. 286, 290 (1920); *Dismuke v. United States*, 297 U. S. 167, 173 (1936).

(b) attorney's fees and costs. The total sum of the judgment for all petitioners was \$42,110.34.²

FACTS ESTABLISHED BY THE RECORD

Nature of Appellants' Work and Basis of Their Claims for Overtime

Nature of Employment. Petitioners were paid weekly salaries, not hourly rates. The salaries of each varied during the period in controversy. None kept any regular account of his time when employed by respondent or was required to do so by respondent. Petitioners reported for work at various times during the day depending upon the nature of the work performed by each. They punched no time clock when they came in; they punched no time clock when the day was over; and they never reported any overtime to their employer or made any claim for overtime during the course of their employment or prior to the filing of the suit herein, more than eighteen months after the last of them was discharged and after respondent ceased publishing its newspaper.

It is undisputed that the work of each petitioner varied in character from day to day, from week to week; that they were never instructed how to do it or when to do it; that the coverage of assignments was left to the discretion of the men receiving them. Just as the work varied in character, so did the time consumed fluctuate from day to day and week to week.

How Petitioners Calculated Their Claimed Overtime

Each of the petitioners who appeared to prosecute his claim offered certain tabulations as to overtime alleged by him to have been worked while in the employ of respondent.

² The judgment when reduced to dollars and cents cost imposed a burden of \$1.12½ on each copy of respondent's newspaper sent outside of the State of New York during the period in controversy whereas the price actually paid by subscribers for those newspapers was 2¢ per copy.

All of these tabulations were prepared after the institution of the suit and each of them in respect of the particular petitioner in behalf of whom it was offered differed from the claim advanced in the amended complaint. The method of preparation of these tabulations was disclosed during the course of the testimony. Petitioner Mabée who was the first witness testified that he had spent some 50 hours in the White Plains Public Library going over the files of the White Plains Reporter from October 24, 1938, until February 28, 1941, when it suspended publication (R. 54). From those files he made notes of the work which he did, estimated the hours which he spent on each of the assignments and then computed his claim of overtime. Mabée admitted on cross-examination that he kept no records and that he did not refer to the assignment book to check on his calculations. The concluding question and Mabée's answer thereto illustrate how his work was done, as follows:

"Q. Where were any records kept such as you attempted to make here of the work of yourself and of the other employees?

"A. Only in my head" (R. 106).

Even so, Mabée asserted that he could identify each and every job he had performed during the period in controversy by reference to the printed volumes of the White Plains Reporter (R. 80) and also that because of his familiarity with the assignments of the other petitioners herein he could identify their work.

Cross-examination of other petitioners developed that Mabée had also prepared tabulations of their claimed overtime for them which they in turn checked mainly from memory. Petitioner Barnum, for instance, testified that he took Mabée's word as to many of the assignments which he claimed to have covered and for which he claimed overtime compensation (R. 196) and that he didn't even bother to check Mabée's calculations against the printed volumes

of the White Plains Reporter kept in the Public Library. He merely checked many of Mabee's listings from his head (R. 198).

Barnum offered a tabulation of his overtime hours, which was admitted in evidence. Later, after it developed he was on vacation at a time the tabulation showed six overtime assignments, he took the stand and corrected it by deleting those six assignments and substituting four additional ones after he returned (Petitioner's Ex. 7 and 14).

Petitioner Mockridge kept clippings of byline stories which he wrote (R. 111), but depended upon Mabee to prepare a list of his other work (R. 139). Mockridge himself originally claimed to have covered a G. O. P. rally in White Plains but when Mabee informed him that some one else had written that story he struck it from his tabulation (R. 139). No one of the petitioners even attempted to claim that his tabulation was accurate in any sense of the word. Each asserted that it was a minimum calculation, not a maximum and not an accurate calculation.

On Mabee's tabulation of overtime claims were two claims for time spent while he was playing golf with the editor of the newspaper (R. 88-89). Three of the original petitioners worked on the sports desk and the testimony developed the fact that all three of them would go to such events as boxing matches, wrestling matches and hockey games where one would write the story, yet all claimed overtime. Petitioner O'Donovan was active in civic and in National Guard work (but resigned his commission just before the Guard was called into active service), yet he claimed overtime when he went to military functions, when he presided as toastmaster at various dinners and banquets in connection with his civic and military activities (R. 305-306) and asserted that he would not have participated in any such activities except for his connection with the

respondent's newspaper (R. 302). O'Donovan was responsible for his own assignments, if such they can be called, and respondent never heard anything about many of them until he presented his claim for overtime at the trial.

Five of the six petitioners calculated their overtime on an even hour basis. The sixth calculated his on a half hour basis. The record demonstrates that newspaper reporting, cannot be calculated on either basis.

As the record stands today no one, not even the petitioners themselves, can tell how much overtime, if any, they worked.

The same is true as to money damages claimed. The amounts testified to by the different petitioners differed from the amounts claimed by them in their complaint. None of these amounts is based on the payroll week itself.

There was no evidence before the trial court in the nature of a payroll week tabulation which applies a true hourly rate against the actual number of hours worked in any such week even though the trial judge specifically requested counsel for petitioners to prepare and present such tabulations. All that counsel did was this: He fixed the hourly rate by dividing the weekly wage by 40 and he fixed the overtime rate at one and one-half times that result. Then he took each of the petitioners' claims of "minimum overtime" and multiplied it by the overtime rate which he in turn had fixed by the above described method.³

³ This Court, in a case wherein it held the law to apply, held that the "regular rate" at which one is employed, made by Section 7 of the Federal Fair Labor Standards Act of 1938 the basis upon which his overtime is to be computed is, in the case of one working for a varying number of hours per week for a fixed weekly wage, the quotient obtained by dividing the weekly wage by the number of hours worked each week even though such quotient may vary from week to week with the number of hours worked. Wages divided by hours equal regular rate. Time and one-half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours. *Overnight Motor Transportation Company, Inc. v. William H. Missel*, 316 U. S. 572, 580 (1942).

As to the Nature of Petitioners' Work

O'Donovan. The petitioner O'Donovan was City Editor of the White Plains Reporter (R. 287). As such he had charge under the direction of the Editor of getting out the news pages of that newspaper each day (R. 315). In addition, during a long period when the Editor was away on account of illness, he was in complete charge of all of the editorial content of the newspaper including the editorial pages as well as the news pages (R. 314). He made recommendations on hiring and firing (R. 313-314) and on the increasing or decreasing of salaries. He carried out the policies of his employers and owned a small amount of stock in respondent company (R. 306).

Mabee. The petitioner Mabee during the greater portion of his time in controversy with respondent was the Assistant City Editor of the newspaper. As such he gave assignments to reporters, handled many details for the executives including the disposition of complaints and the transaction of other matters of business (R. 44-46, 67-68). He directed the work of others at all times even when he ceased being Assistant City Editor and became Sports Editor in which position he had an assistant whose work he supervised and to whom he gave assignments.

Petitioners Barnum, Tompkins, Mockridge and Trow. Petitioners Barnum, Tompkins, Mockridge and Trow were reporters. All of them were engaged solely in local activities, that is, in gathering news of various events that occurred in and about White Plains and adjacent Westchester County, writing such news and turning it in for publication to the newspaper.

As to Respondent's Business

The record shows that for a time during the period in controversy respondent obtained reports of the Associated Press, a national news gathering organization. It is un-

disputed that very little either of AP or International News Service reports was used by respondent in the publication of its newspaper (R. 74). Respondent concentrated on local news.

Respondent purchased certain of its supplies from outside of the State of New York, such as all of its newsprint paper and its ink (R. 48). It also obtained certain news features from sources outside of the State of New York (R. 49).

The record is undisputed that in the publication of a daily newspaper no news stories or features are disseminated to readers exactly as they reach the office. All news stories are first read and then selected or discarded. Most of those which came from the Associated Press and the International News Service as well as many of the features were discarded. Those that were selected were edited to suit the needs of the paper. Heads and subheads were written. Then they went to the composing room where they were set in type. After the type was set it was placed in what is known as the page form and when the entire page form was completed a mat was made of the form, a cylinder was cast from this mat, after which the cylinder then went on the press (R. 72).

In the case of pictures one additional process was needed before they reached the press. After selection they first went to the stereotype room where a flat cast was made of them for insertion on the page form. This process was a substitute in respect of pictures for the process of setting written copy in type (R. 72-73). Legends for pictures were set in type and handled as other written copy.

After the round cylinder was placed on the press the ink was applied, the press was started and the newspaper came off the press.

It is also undisputed in the record that a small percentage of the advertising published by respondent was what is

known as national or general advertising, that is, advertising that came from outside of White Plains from agencies engaged in placing such advertising with newspapers throughout the country. By far the greater volume of advertising was local advertising originating in White Plains and its immediate vicinity. This consisted principally of what is known as local display advertising, classified advertising and legal advertising.

The record shows that there was no actual or practical continuity of materials from outside the state to respondent's readers within the State of New York. There was a definite "break" or termination of the interstate movement of the materials. After they reached respondent's office they were processed by independent acts of a purely local nature.

Appellate Division's Reversal

Respondent appealed from the judgment of the Trial Court to the Appellate Division, Second Department of the Supreme Court of the State of New York which unanimously reversed the Trial Court. In its appeal respondent presented all of the issues hereinbefore referred to but the Appellate Division in its opinion stated:

"In view of our determination that appellant (respondent here) was not engaged in interstate commerce and that respondents (petitioner here) were not engaged in any process or occupation necessary to the production of goods in interstate commerce within the meaning of the Act, it is unnecessary to discuss the other questions raised."

Petitioners appealed from the order of the Appellate Division to the Court of Appeals of New York. All of the issues were presented to the Court of Appeals which unanimously affirmed the Appellate Division's order of reversal. Later, on motion of petitioners, the Court of Ap-

peals amended its remittitur by adding thereto the following:

"Upon this appeal there was presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. This court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938."

Just prior to the expiration of time for filing a petition for a writ of certiorari in this Court, petitioners obtained an extension of time for such filing from Associate Justice Jackson until April 12, 1945. On April 12, 1945, a petition for a writ of certiorari was filed and attached to it was a Motion to Dispense with Reprinting Record on Certiorari.

AS TO THE MOTION TO DISPENSE WITH THE PRINTING OF THE RECORD

It is difficult for this respondent to determine under what rule of the Court petitioners believe the Court should act to dispense with the printing of the record. None of the petitioners is a pauper. According to information and belief petitioner William L. O'Donovan is now employed by the Celanese Corporation of America with offices both in New York City and Washington, D. C. For many years O'Donovan had been active in National Guard work in New York and had risen to the position of Captain-Adjutant of the regiment. He resigned from the Guard just before it was called into active service. He gave as his reason that he resigned because "I had a wife and children to support so I went out and got it (a job), but I could not take a new job and then ask for time off to go to camp within a few months, so I had to sever my connections" (R. 307). O'Donovan further testified that had he remained in the Guard his salary and allowances as a Captain would have been about \$320 a month. Presumably his present income is larger than that.

Tompkins, another petitioner, according to information and belief is now employed by a national advertising agency with offices in Dayton, Ohio.

Trow, another of the petitioners, is now employed on the New York World-Telegram in New York.

Barnum, still another petitioner, is employed by the Journal of Commerce in New York.

Petitioners Mockridge and Mabee are in the armed services.

The fact that respondent herein would not stipulate to a reduction of the record consisting of more than 500 pages to a record of approximately 100 pages is no reason for the granting of the motion. Respondent was entirely within

its rights under the rules of this Court in refusing to stipulate the elimination from the record of testimony and exhibits it regards as pertinent to the issues in the case.

It would seem unnecessary in this memorandum to discuss the differing points of view of petitioners and respondent as to this Court's duty in the premises. Respondent has no objection whatsoever to the granting of the motion to dispense with the printing of the record if that motion is consonant with the Court's procedure under its rules. Respondent does feel obligated, however, to call to the attention of the Court the fact that petitioners are not paupers and further to the fact that under the rules respondent is not obligated to waive any of its rights insofar as the presentation of the whole record is concerned merely at the demand of petitioners.

REASONS FOR DENIAL OF THE WRIT

1. *The Court of Appeals of New York in affirming the Appellate Division's order was correct in holding that petitioners and respondent were not engaged in commerce or in the production of goods for commerce within the meaning of the Act.*

The fact that respondent received news, feature articles and materials from out of the state did not, as contended by petitioners, bring respondent within the coverage of the Act. This Court in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (1943), at page 571, stated that " * * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins v. Carr Brothers Co.*, 317 U. S. 572 (1943), this Court held the Act inapplicable to a business which imported materials from out of state where the goods came to rest within the state and there was no actual or practical

continuity of movement of materials from without the state to customers within the state.

As pointed out by the Appellate Division, the United States Circuit Court of Appeals for the Fourth Circuit in *Schroepfer v. A. S. Abell Co.*, 138 F. 2d 111 (certiorari denied January 17, 1944, 321 U. S. 763, rehearing denied May 22, 1944, 322 U. S. 770) rejected the "identical argument, under similar facts" offered by petitioners in the Appellate Division. This case is in point because it recognized that a newspaper publisher does not merely pass on to his readers the materials he has received but sells them an entirely new article composed of these materials. As the Fourth Circuit Court said:

"* * * there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. 2d at page 114.)

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock v. Curtis Publishing Co.*, 252 U. S. 436 (1920).

As the Appellate Division stated, "The conclusion is irresistible that appellant (respondent here) was engaged in a strictly local as distinguished from a national activity, i. e., the local business of publishing a local newspaper."

Thus, respondent's business falls within the category of local business which Congress left to the protection of the states. *Walling v. Jacksonville Paper Co., supra.*

The Appellate Division held that the mailing of less than one-half of one per cent of respondent's total circulation to subscribers temporarily outside of the state did not change its business from an intrastate to an interstate enterprise. The Court of Appeals affirmed this holding. This interstate circulation comes within the *de minimis* doctrine.

This holding is in harmony with decisions of this Court for this Court in *NLRB v. Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the doctrine of *de minimis*. Since, as this Court has pointed out in *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517 (1942) and *Walling v. Jacksonville Paper Co., supra*, the Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act, it is clear that the courts in construing the Fair Labor Standards Act should apply the *de minimis* doctrine to certain cases.

In a number of cases arising under the Act, the courts have applied this doctrine by holding that where the interstate business of the employer constitutes only a small portion of the total business and where it is not an integral part of the service rendered the Act does not apply. *Goldberg v. Worman*, 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Rauhoff v. Henry Gramling & Co.*, 42 F. Supp. 754 (E. D. Arkansas, August 22, 1941); *Zehring v. Brown Materials*, 48 F. Supp. 740 (S. D. California, January 19, 1943); *Cron v. Goodyear Tire & Rubber Co.*, 49 F. Supp. 1013 (M. D. Tennessee, April 28, 1943); *Sapp et al. v. Horton's Laundry*, 56 F. Supp. 901 (N. D. Georgia, January 18, 1944). The Appellate Division and the Court of Appeals followed this line of cases.

Petitioners, however, contend that the appellate courts erred in following this line of cases and should have followed certain cases which they list as controlling. It is submitted that *Gerdert v. Certified Poultry & Egg Co.*, 38 F. Supp. 964 (S. D. Florida, April 29, 1941), cited by petitioners, is not authority for the proposition that the *de minimis* doctrine is not applicable to cases arising under the Fair Labor Standards Act. Nor is *Dorner v. Iaco Clothes, Inc.*, 7 Wage and Hour Reporter 35 (N. D. Illinois, December 24, 1943) controlling here for in that case the court recognized that there would be many cases arising under the Act in which the doctrine would be applied but stated that it could not be applied there where a "substantial part" of the employer's products flowed in interstate commerce. Likewise, it was not applicable in *Walling v. Partee et al.*, 6 Wage and Hour Reporter 863 (M.D. Tennessee, May 26, 1943) where 15.16 per cent of the company's products went out of state nor in *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tennessee, May 3, 1940), where a substantial part (over 20 per cent) of the products of the company and its parent company were destined for interstate commerce.

Furthermore, the opinion of the Appellate Division shows that it was cognizant of the line of cases cited by petitioners in which the courts have refused to apply the *de minimis* doctrine because the interstate business, although small in amount, was regular and an integral part of the business. It analyzed these cases and pointed out the essential difference between these cases and the present one. It held, and the Court of Appeals affirmed, that they were not applicable here and that the present case would come within the *de minimis* doctrine because the out of state circulation was not an essential part but only an incidental part of the service respondent rendered its local subscribers.

Here, as the Appellate Division found, respondent "had no desire and made no effort to secure 'out of state' circulation, although during the summer its newspaper was mailed to subscribers who were temporarily out of the State on vacation or absent from the State while at school or in the armed forces." It correctly held that this interstate business was "not regular but casual; not an integral but only an incidental part of its essentially local service." Certainly this out of state circulation did not bring respondent within the coverage of an Act designed to suppress nationwide competition in interstate commerce for respondent was in no sense competing interstate with other newspapers.

2. The question presented by this petition is not an open one as yet undecided by this Court.

There is nothing whatsoever in the record to sustain the statement that the New York courts in their decisions on the commerce question in this case "considered the question an open one in this Court and one that should be decided by this Court", as was stated in petitioner's Jurisdictional Statement at page 7. Nor did the Appellate Division state that it was deciding questions arising under the Act not yet decided by this Court as petitioners would have it appear from the quotation set forth on page 15. The Appellate Division actually said that there had been presented to it the questions whether the Act could constitutionally be applied to the newspaper publishing business because of the guaranties contained in the First and Fifth Amendments, that these precise questions had not been decided by this Court, and that it was not necessary for it to pass upon these questions. It unanimously found that under applicable decisions of this Court and other federal courts the respondent was not engaged in commerce and peti-

tioners were not engaged in producing goods for commerce.

The Court of Appeals unanimously affirmed the Appellate Division. When petitioners sought rehearing before the Court of Appeals their motion therefor was denied. All that the Court of Appeals did was to amend its remittitur in accordance with petitioners' request to state that there had been presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Act and that the Court of Appeals had held that respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

3. Review if Granted Should be all Embracing.

The constitutional issues were decided adversely to respondent by the motions judge and the trial judge. Neither the Appellate Division nor the Court of Appeals considered it necessary to pass upon those issues in view of the fact that both of them unanimously held that respondent was not engaged in commerce or in producing goods for commerce and that petitioners were not engaged in any occupation or process necessary to the production of goods for commerce. Respondent preserved these issues in its appeal to the Appellate Division and in the proceedings before the Court of Appeals. If review be granted, it should be all embracing.

Likewise, respondent in its appeal to the Appellate Division attacked the findings of the trial court on the ground that no credence should be given to evidence manufactured as was the evidence of petitioners in this case, and further on the ground that the judgment itself was contrary to the decisions of this Court in cases affecting recoveries under

the Act where the Act was held applicable. Just as in the case of the constitutional questions presented, the Appellate Division and the Court of Appeals found it unnecessary to pass upon these questions in order to reach their decisions reversing the trial court. The Appellate Division, however, did observe that the award to each respondent was excessive insofar as it computed overtime compensation on a regular workweek of 40 hours rather than 44 hours during the first year's operation of the Act and 42 hours during the second year's operation of the Act. The trial judge also granted interest which this Court has said is not allowable.

To insist upon an all-embracing review, if the petition be granted, is not to concede that the controversy should be reviewed. The judgment of the Court of Appeals of the State of New York was properly entered on the question of commerce. Only in the event this Court thinks that judgment should be reviewed is request made that all issues should be reviewed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved

The constitutional provisions involved are Article I, Section 8 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States.

Article I, Section 8 of the Constitution of the United States provides that:

“The Congress shall have Power To regulate Commerce among the several States”

The First Amendment to the Constitution of the United States provides that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The Fourth Amendment to the Constitution of the United States provides that:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fifth Amendment to the Constitution of the United States provides that:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.¹

MINIMUM WAGES :

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

- (1) during the first year from the effective date of this section, not less than 25 cents an hour,
- (2) during the next six years from such date, not less than 30 cents an hour,

¹ Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.¹

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).¹

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

¹ Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner: The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.¹

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

¹ Amendment provided by Act of August 9, 1939 (Public No. 544, 76th Congress. 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

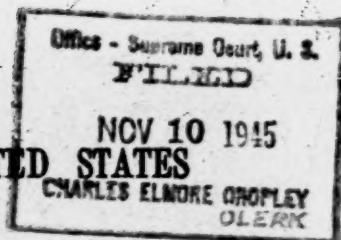
"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945



No. 57

**COURTNEY M. MABEE, CHARLES K. BARNUM,
EDWARD G. TOMPKINS, NORTON MOCKRIDGE,
GEORGE S. TROW AND WILLIAM L. O'DONOVAN,**
Petitioners,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent

**BRIEF FOR RESPONDENT, WHITE PLAINS
PUBLISHING COMPANY, INC.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 57

**COURTNEY M. MABEE, CHARLES K. BARNUM,
EDWARD G. TOMPKINS, NORTON MOCKRIDGE,
GEORGE S. TROW AND WILLIAM L. O'DONOVAN,**

vs.

Petitioners,

WHITE PLAINS PUBLISHING COMPANY, INC.,

Respondent

**BRIEF FOR RESPONDENT, WHITE PLAINS
PUBLISHING COMPANY, INC.**

Opinions Below

The opinion of the Trial Term, Supreme Court, Westchester County, is reported at 180 Misc. 8, 41 N. Y. S. 2d 534 (R. 533-541, A. R. 88-95).¹

The opinion of the Appellate Division of the Supreme Court for the Second Judicial Department is reported at 267 A. D. 284, 45 N. Y. S. 2d 479 (R. 551-561, A. R. 97-103).

The decision of the Court of Appeals of New York affirming the Appellate Division's reversal of the Trial Term is reported at 293 N. Y. 781.

¹ In this brief, respondent's record references refer to the original record presented to this Court. Where the matter referred to is also printed in the abbreviated record, this record reference will be indicated by the letters A. R.

The order of the Court of Appeals amending the remittitur is reported at 294 N. Y. 701 (R. 547, A. R. 105).

Jurisdiction

The judgment of the Court of Appeals of New York was entered on November 16, 1944. The remittitur of the Court of Appeals was amended on March 9, 1945. Between the entry of the judgment and the amendment of the remittitur petitioners obtained an order from Associate Justice Jackson of this Court extending their time to apply for a writ of certiorari sixty days from February 12, 1945.

Petitioners filed their petition for a writ of certiorari on April 12, 1945, invoking the jurisdiction of this Court under Section 237 (b) of the Judicial Code, as amended, by the Act of February 13, 1925. Certiorari was granted on May 21, 1945.

Questions Presented

1. Whether respondent was engaged in commerce or the production of goods for commerce and whether petitioners were engaged in any process or occupation necessary to the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.
2. Whether Congress, in the light of the prohibition in the First Amendment against the abridgment of the freedom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of respondent.
3. Whether, in view of the provisions of the First and Fifth Amendments, Congress has the power to regulate the business of the press by classifying the press on the basis of volume of circulation, frequency of issue and area of distribution in such a manner as to exempt more than 72 per cent of the total number of newspapers from the burdens

of the Act, while subjecting all others engaged in the same business to those burdens.

4. Whether petitioners sustained the burden of establishing the fact of overtime work and also the quantity of overtime work each week in the light of the record evidence that their claims bore every earmark of an afterthought manufactured for the occasion to which no credence should be given.

5. Whether petitioners' method of computation conforms to the provisions of Section 7 of the Act as interpreted by this Court.

6. Whether petitioners or any of them were professional employees and therefore exempt from the provisions of the Act.

Constitutional, Statutory and Regulatory Provisions Involved

The constitutional provisions involved are Article I, Section 8, Clause 3 of the Constitution of the United States and the First and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Appendix, page 47.

The statutory provisions involved are those embraced in the Fair Labor Standard Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*).

The regulatory provisions involved are the regulations of the Administrator of the Wage and Hour Act, promulgated under the authority granted in Section 13 (a) (1) of the Act. These regulations are set forth in the Appendix, pages 49-50.

Statement of the Case

Petitioners started suit on September 14, 1942, in the Supreme Court of the State of New York, Westchester

County, to recover overtime compensation claimed to be due under the provisions of the Fair Labor Standards Act. Respondent for many years prior to February 28, 1941, had been publisher of an evening newspaper, known as The White Plains Daily Reporter, published each weekday evening, except Sunday and certain specified holidays, throughout the year. The newspaper suspended publication on February 28, 1941.

Following the filing of the complaint in the Trial Court respondent moved to dismiss under Rule 106 of the Rules of Civil Practice of New York on the ground that the complaint did not state facts sufficient to constitute a cause of action and also for an order dismissing the complaint under Rule 107 on the ground that the court had no jurisdiction over the subject matter of the action for the reason that (a) the Act under which the claims were alleged to have arisen is not a statute which can be applied to the business of respondent by reason of the provisions of Article I, Section 8, Clause 3 (the commerce clause) and the First Amendment to the Constitution of the United States, and (b) the Act violates the rights of respondent as guaranteed by the Fifth Amendment to the Constitution of the United States. The motion was denied.

Subsequently all of the petitioners filed an amended complaint, answer to which was filed by respondent. When petitioners rested during trial, respondent moved to dismiss for failure of proof which motion was denied. Petitioners moved to have the pleadings conformed to the proof and over objection this motion was granted. Respondent then renewed its motions on the statutory and constitutional grounds which were denied, and petitioners moved for judgment on the pleadings.

The Trial Court rendered judgment in favor of each of the petitioners for their claimed overtime compensation

in a sum for each computed to include (a) the amount of claimed overtime at the rate of one and one-half times the regular rate at which each petitioner was employed, "regular rate" being construed by the Trial Court to be the employee's weekly salary divided by forty hours, *plus interest*, plus an additional equal amount as liquidated damages, and (b) attorney's fees and costs. The total sum of the judgment for all petitioners was \$42,110.34.²

Facts Established by the Record

NATURE OF PETITIONERS' WORK AND BASIS OF THEIR CLAIMS FOR OVERTIME

Nature of Employment. Petitioners were paid weekly salaries, not hourly rates. The salaries of each varied during the period in controversy. None kept any regular account of his time when employed by respondent or was required to do so by respondent. Petitioners reported for work at various times during the day depending upon the nature of the work performed by each. They punched no time clock when they came in; they punched no time clock when the day was over; and they never reported any overtime to their employer or made any claim for overtime during the course of their employment or prior to the filing of the suit herein, more than eighteen months after the last of them was discharged and after respondent ceased publishing its newspaper.

It is undisputed that the work of each petitioner varied in character from day to day, from week to week; that they were never instructed how to do it or when to do it; that the coverage of assignments was left to the discretion of

² The judgment when reduced to dollars and cents cost imposed a burden of \$1.12½ on each copy of respondent's newspaper sent outside of the State of New York during the period in controversy whereas the price actually paid by subscribers for those newspapers was 2¢ per copy.

the men receiving them. Just as the work varied in character, so did the time consumed fluctuate from day to day and week to week.

HOW PETITIONERS CALCULATED THEIR CLAIMED OVERTIME

Each of the petitioners who appeared to prosecute his claim offered certain tabulations as to overtime alleged by him to have been worked while in the employ of respondent.

All of these tabulations were prepared after the institution of the suit and each of them in respect of the particular petitioner in behalf of whom it was offered differed from the claim advanced in the amended complaint. The method of preparation of these tabulations was disclosed during the course of the testimony. Petitioner Mabee who was the first witness testified that he had spent some 50 hours in the White Plains Public Library going over the files of the White Plains Reporter from October 24, 1938, until February 28, 1941, when it suspended publication (R. 54). From those files he made notes of the work which he did, estimated the hours which he spent on each of the assignments and then computed his claim of overtime. Mabee admitted on cross-examination that he kept no records and that he did not refer to the assignment book to check on his calculations. The concluding question and Mabee's answer thereto illustrate how his work was done, as follows:

"Q. Where were any records kept such as you attempted to make here of the work of yourself and of the other employees?

"A. Only in my head" (R. 106).

Even so, Mabee asserted that he could identify each and every job he had performed during the period in controversy by reference to the printed volumes of the White Plains Reporter (R. 80) and also that because of his famil-

ilarity with the assignments of the other petitioners herein he could identify their work.

Cross-examination of other petitioners developed that Mabee had also prepared tabulations of their claimed overtime for them which they in turn checked mainly from memory. Petitioner Barnum, for instance, testified that he took Mabee's word as to many of the assignments which he claimed to have covered and for which he claimed overtime compensation (R. 196) and that he didn't even bother to check Mabee's calculations against the printed volumes of the White Plains Reporter kept in the Public Library. He merely checked many of Mabee's listings from his head (R. 198).

Barnum offered a tabulation of his overtime hours, which was admitted in evidence. Later, after it developed he was on vacation at a time the tabulation showed six overtime assignments, he took the stand and corrected it by deleting those six assignments and substituting four additional ones after he returned (Plaintiffs' Ex. 7 and 14).

Petitioner Mockridge kept clippings of byline stories which he wrote (R. 111), but depended upon Mabee to prepare a list of his other work (R. 139). Mockridge himself originally claimed to have covered a G. O. P. rally in White Plains but when Mabee informed him that some one else had written that story he struck it from his tabulation (R. 139). No one of the petitioners even attempted to claim that his tabulation was accurate in any sense of the word. Each asserted that it was a minimum calculation, not a maximum and not an accurate calculation.

On Mabee's tabulation of overtime claims were two claims for time spent while he was playing golf with the editor of the newspaper (R. 88-89). Three of the original petitioners worked on the sports desk and the testimony developed the fact that all three of them would go to such

events as boxing matches, wrestling matches and hockey games where one would write the story, yet all claimed overtime. Petitioner O'Donovan was active in civic and in National Guard work (but resigned his commission just before the Guard was called into active service), yet he claimed overtime when he went to military functions, when he presided as toastmaster at various dinners and banquets in connection with his civic and military activities (R. 305-306) and asserted that he would not have participated in any such activities except for his connection with the respondent's newspaper (R. 302). O'Donovan was responsible for his own assignments, if such they can be called, and respondent never heard anything about many of them until he presented his claim for overtime at the trial.

Five of the six petitioners calculated their overtime on an even hour basis. The sixth calculated his on a half hour basis. The record demonstrates that newspaper reporting cannot be calculated on either basis.

As the record stands today no one, not even the petitioners themselves, can tell how much overtime, if any, they worked.

The same is true as to money damages claimed. The amounts testified to by the different petitioners differed from the amounts claimed by them in their complaint. None of these amounts is based on the payroll week itself.

There was no evidence before the trial Court in the nature of a payroll week tabulation which applies a true hourly rate against the actual number of hours worked in any such week even though the trial judge specifically requested counsel for petitioners to prepare and present such tabulations. All that counsel did was this: He fixed the hourly rate by dividing the weekly wage by 40 and he fixed the overtime rate at one and one-half times that result. Then he took each of the petitioners' claims of "minimum over-

time" and multiplied it by the overtime rate which he in turn had fixed by the above described method.³

AS TO THE NATURE OF PETITIONERS' WORK

O'Donovan. The petitioner O'Donovan was City Editor of the White Plains Reporter (R. 287). As such he had charge under the direction of the Editor of getting out the news pages of that newspaper each day (R. 315). In addition, during a long period when the Editor was away on account of illness, he was in complete charge of all of the editorial content of the newspaper including the editorial pages as well as the news pages (R. 314). He made recommendations on hiring and firing (R. 313-314) and on the increasing or decreasing of salaries. He carried out the policies of his employers and owned a small amount of stock in respondent company (R. 306).

Mabee. The petitioner Mabee during the greater portion of his time in controversy with respondent was the Assistant City Editor of the newspaper. As such he gave assignments to reporters, handled many details for the executives including the disposition of complaints and the transaction of other matters of business (R. 44-46, 67-68). He directed the work of others at all times even when he ceased being Assistant City Editor and became Sports Editor in which position he had an assistant whose work he supervised and to whom he gave assignments.

³ This Court, in a case wherein it held the law to apply, held that the "regular rate" at which one is employed, made by Section 7 of the Federal Fair Labor Standards Act of 1938 the basis upon which his overtime is to be computed is, in the case of one working for a varying number of hours per week for a fixed weekly wage, the quotient obtained by dividing the weekly wage by the number of hours worked each week even though such quotient may vary from week to week with the number of hours worked. Wages divided by hours equal regular rate. Time and one-half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours. *Overnight Motor Transportation Company, Inc. v. William H. Missel*, 316 U. S. 572, 580 (1942).

Petitioners Barnum, Tompkins, Mockridge and Trow. Petitioners Barnum, Tompkins, Mockridge and Trow were reporters. All of them were engaged solely in local activities, that is, in gathering news of various events that occurred in and about White Plains and adjacent Westchester County, writing such news and turning it in for publication to the newspaper.

AS TO RESPONDENT'S BUSINESS

Respondent was engaged in the publication of a local newspaper at White Plains, Westchester County, New York. It had no interest in out of state circulation. Indeed it did not even seek to circulate throughout the whole of Westchester County. Throughout the period in controversy its total circulation ranged from 9,000 to 11,000 copies daily and never more than 45 copies a day were sent outside the State of New York—those few copies going to residents of White Plains temporarily away from home.

The record shows that for a time during the period in controversy respondent obtained reports of the Associated Press and also of International News Service, national news gathering organizations. The Associated Press Service was not received directly from the Associated Press office in New York but was relayed to respondent over a County News Service wire not owned or controlled by the Associated Press.

Under its contract with the International News Service, respondent was obligated to make available to International News Service at respondent's offices in White Plains its local news for such use as International News Service wanted to make of it.

It is undisputed that very little either of Associated Press or International News Service reports was used by respondent in the publication of its newspaper (R. 74, A. R. 38). Respondent concentrated on local news.

Respondent purchased certain of its supplies from outside of the State of New York, such as all of its newsprint paper and its ink (R. 48, A. R. 30). It also obtained certain news features from sources outside of the State of New York (R. 49, A. R. 31).

The record is undisputed that in the publication of a daily newspaper no news stories or features are disseminated to readers exactly as they reach the office. All news stories are first read and then selected or discarded. Most of those which came from the Associated Press and the International News Service as well as many of the features were discarded. Those that were selected were edited to suit the needs of the paper. Heads and subheads were written. Then they went to the composing room where they were set in type. After the type was set it was placed in what is known as the page form and when the entire page form was completed a mat was made of the form, a cylinder was cast from this mat, after which the cylinder then went on the press (R. 72, A. R. 37).

In the case of pictures one additional process was needed before they reached the press. After selection they first went to the stereotype room where a flat cast was made of them for insertion on the page form. This process was a substitute in respect of pictures for the process of setting written copy in type (R. 72-73, A. R. 37). Legends for pictures were set in type and handled as other written copy.

After the round cylinder was placed on the press the ink was applied, the press was started and the newspaper came off the press.

It is also undisputed in the record that a small percentage of the advertising published by respondent was what is known as national or general advertising, that is, advertising that came from outside of White Plains from agencies engaged in placing such advertising with newspapers throughout the country. By far the greater volume of

advertising was local advertising originating in White Plains and its immediate vicinity. This consisted principally of what is known as local display advertising, classified advertising and legal advertising.

The record shows that there was no actual or practical continuity of materials from outside the state to respondent's readers within the State of New York. There was a definite "break" or termination of the interstate movement of the materials. After they reached respondent's office they were processed by independent acts of a purely local nature.

APPELLATE DIVISION'S REVERSAL

Respondent appealed from the judgment of the Trial Court to the Appellate Division, Second Department of the Supreme Court of the State of New York which unanimously reversed the Trial Court. In its appeal respondent presented all of the issues hereinbefore referred to but the Appellate Division in its opinion stated:

"In view of our determination that appellant (respondent here) was not engaged in interstate commerce and that respondents (petitioners here) were not engaged in any process or occupation necessary to the production of goods in interstate commerce within the meaning of the Act, it is unnecessary to discuss the other questions raised."

Petitioners appealed from the order of the Appellate Division to the Court of Appeals of New York. All of the issues were presented to the Court of Appeals which unanimously affirmed the Appellate Division's order of reversal. Later, on motion of petitioners, the Court of Appeals amended its remittitur by adding thereto the following:

"Upon this appeal there was presented and necessarily passed upon the question whether the respond-

ent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. This Court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938."

Just prior to the expiration of time for filing a petition for a writ of certiorari in this Court, petitioners obtained an extension of time for such filing from Associate Justice Jackson until April 12, 1945. On April 12, 1945, a petition for a writ of certiorari was filed. Certiorari was granted May 21, 1945.

Summary of Argument

POINT I. The fact that respondent received news, feature articles and other material from out of state did not bring it within the coverage of the Act. The interstate movement of these materials ended when they reached respondent. They were processed into an entirely new article before they were passed on to respondent's readers. Petitioners were not substantially engaged in commerce because they did not handle the materials received from out of state until after the interstate journey had ended. The business of publishing a local newspaper is a strictly local business. Neither respondent nor petitioners were engaged in the production of goods for commerce. The mailing of less than one half of one per cent of respondent's total circulation out of state falls within the *de minimis* doctrine because it could not possibly have the detrimental economic effect on interstate commerce that the Act was intended to control.

POINT II. Even if this Court should hold that petitioners were covered by the Act, the recoveries allowed by the Trial Court should not be reinstated because there was not suffi-

cient evidence to support petitioners' claims or the Trial Court's findings. It is well settled that in employees' suits to recover under the Act the burden of proof rests upon the plaintiff who must establish by a preponderance of the evidence the facts of overtime and the amount of overtime worked each week. Petitioners plainly failed to meet this burden. They had kept no time records and made no attempt to reconstruct any records until after this suit was filed. The record clearly shows that no credence should be given to petitioners' claims which bear every earmark of an afterthought manufactured for the occasion.

POINT III. The recoveries granted by the Trial Court should not be reinstated because the computation of overtime was incorrect and because of the allowance of interest. The recoveries of interest cannot be reinstated because this Court has held in *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697 (1945), that interest is not recoverable under Section 16 (b). Moreover, the recoveries of overtime cannot be reinstated because of the failure of the Trial Court to follow the rule laid down by this Court in *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572 (1942). Petitioners worked a varying work week for a fixed weekly salary so the *Missel* rule should have been applied to determine the basic hourly rate each petitioner was paid each week.

POINT IV. Under the decision of this Court in *Murdock v. Pennsylvania*, 319 U. S. 105 (1943), this Act cannot be applied to the newspaper business for it lays a direct burden on the business of the press. If a publisher is limited in his operations by the application of the burdens of the Act, he will be unable to serve his readers adequately. Moreover, newspapers which are unable to operate successfully under the Act will be forced to eliminate their out of state subscribers in order to remove themselves from any

possible application of the Act. Furthermore, this Act does not treat all newspapers alike but classifies them for the purpose of regulation. This Court has held that classification of newspapers for the purpose of regulation violates the First Amendment. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).

POINT V. Under the terms of the Act, many of respondent's competitors in the vicinity of White Plains are exempt from the burdens of the Act. All newspapers are engaged in exactly the same business and mere size affords no basis for regulation. The application of the Act to petitioner while its competitors are exempted constitutes an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments and is in conflict with the principles announced by this Court in *Grosjean v. American Press Co.*, *supra*.

POINT VI. Even if respondent was covered by the Act, petitioners cannot recover because they were exempt from the provisions of the Act as professional employees within the meaning of Section 13 (a) (1). Petitioners at all times during the period in controversy were engaged in professional work. Moreover, petitioner O'Donovan was exempt as an executive employee and petitioner Mabee was exempt as an administrative employee.

Argument

POINT I

Respondent was not engaged in commerce or in the production of goods for commerce and none of petitioners was engaged in commerce or in any process or occupation necessary to the production of goods for commerce.

The fact that respondent received news, feature articles and materials from out of the state does not, as contended

by petitioners, bring respondent within the coverage of the Act. This Court in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (1943) at page 571, stated that "• • • we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins v. Carr Brothers Co.*, 317 U. S. 572 (1943), this Court held the Act inapplicable to a business which imported materials from out of state where the goods came to rest within the state and there was no actual or practical continuity of movement of materials from without the state to customers within the state.

Precisely that situation is presented in this case. The record shows that for a time during the period in controversy respondent obtained reports of the Associated Press and International News Service, national news gathering organizations. It is undisputed that very little either of AP or International News Service reports was used by respondent in the publication of its newspaper (R. 74, A. R. 38). Respondent concentrated on local news.

Respondent purchased certain of its supplies from outside of the State of New York, such as all of its newsprint paper and its ink (R. 48, A. R. 30). It also obtained certain news features from sources outside of the State of New York (R. 49, A. R. 31).

The record is undisputed that in the publication of a daily newspaper no news stories or features are disseminated to readers exactly as they reach the office. All news stories are first read and then selected or discarded. Most of those which came from the Associated Press and the International News Service as well as many of the features were discarded. Those that were selected were edited to suit the needs of the paper. Heads and subheads were written. Then they went to the composing room where they were set in type. After the type was set it was placed in

what is known as the page form and when the entire page form was completed a mat was made of the form, a cylinder was cast from this mat, after which the cylinder then went on the press (R. 72, A. R. 37).

In the case of pictures one additional process was needed before they reached the press. After selection they first went to the stereotype room where a flat cast was made of them for insertion on the page form. This process was a substitute in respect of pictures for the process of setting written copy in type (R. 72-73, A. R. 37). Legends for pictures were set in type and handled as other written copy.

After the round cylinder was placed on the press the ink was applied, the press was started and the newspaper came off the press.

It is also undisputed in the record that a small percentage of the advertising published by respondent was what is known as national or general advertising, that is, advertising that came from outside of White Plains from agencies engaged in placing such advertising with newspapers throughout the country. By far the greater volume of advertising was local advertising originating in White Plains and its immediate vicinity. This consisted principally of what is known as local display advertising, classified advertising, and legal advertising.

The record shows that there was no actual or practical continuity of materials from outside the state to respondent's readers within the State of New York. There was a definite "break" or termination of the interstate movement of the materials. As the Appellate Division stated, "• • • when these supplies were delivered to appellant's (respondent's here) plant they arrived at their destination and their interstate movement ended." (R. 558; A. R. 101-102.) After they reached respondent's office they were processed by independent acts of a purely local nature. It is immaterial

that respondent used these products immediately. Their interstate movement had ended.

The Appellate Division pointed out that the United States Court of Appeals for the Fourth Circuit in *Schroepfer v. A. S. Abell Co.*, 138 F. 2d 111 (certiorari denied, January 17, 1944; rehearing denied, May 22, 1944) rejected petitioners' contention that the receipt of news and supplies from out of state brings a newspaper within the coverage of the Act. The Fourth Circuit Court recognized that a newspaper publisher does not merely pass on to its readers the materials he has received but sells them an entirely new article composed of these materials. It said:

"* * * there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. 2d at page 114.)

The Circuit Court did not as petitioners state on page 12 of their brief base its decision that the rackmen in the *Schroepfer* case were not subject to the Act on the ground that they were independent contractors and not employees. On the contrary it stated that it was not necessary to decide whether or not the rackmen were employees "since we are of opinion that, even if considered employees of defendant, plaintiffs were not engaged in commerce within the meaning of the act." (138 F. 2d at p. 112.)

But, irrespective of whether the receipt of materials from out of state was sufficient to bring part of respondent's business within the Act (and the record shows it was not),

petitioners have not proved that they were engaged in commerce.

This Court held in *Walling v. Jacksonville Paper Co.*, *supra*, that, to recover under this Act, an employee must show that he was substantially engaged in commerce. And, in *McLeod v. Threlkeld*, 319 U. S. 491 (1943), at page 497, it held that the test of coverage here "is not whether the employees' activities affect or indirectly relate to interstate commerce but whether they are in or so closely related to the movement of the commerce as to be a part of it." Therefore, as the Eighth Circuit Court of Appeals said in *Schwarz v. Witwer Grocery Co.*, 141 F. 2d 341 (1944) (certiorari denied May 29, 1944, 322 U. S. 753), at page 344, petitioners "must have proved that they were engaged in interstate commerce or that 'a substantial part of (their) activities' was in interstate commerce."

This they have failed to do. The interstate movement of the materials had ceased before these materials reached petitioners. "A small part of petitioners' work was the preparation of these materials for publication. This work was an act of a purely local nature and not within the stream of commerce. Most of the time petitioners were not engaged in handling these materials at all but in gathering and writing the news of Westchester County.

Furthermore, respondent was not engaged in producing goods for commerce and petitioners were not engaged in any process or occupation necessary to the production of goods for commerce.

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock v. Curtis Publishing Co.*, 252 U. S. 436 (1920).

The record shows and the Appellate Division found that "The conclusion is irresistible that appellant (respondent here) was engaged in a strictly local as distinguished from a national activity, i. e., the local business of publishing a local newspaper." Thus, respondent's business falls within the category of local business which Congress left to the protection of the states. *Walling v. Jacksonville Paper Co., supra.* And, as this Court recently pointed out in *10 East 40th Street Building, Inc. v. Charles Callus, et al.*, 89 L. ed. 1244 (advance opinions) (1945), courts must be alert "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The mailing of less than one-half of one per cent of its total circulation to subscribers temporarily out of the state did not bring respondent's business within the purview of the Act. The Appellate Division correctly held that this came within the *de minimis* doctrine.

This Court, in *NLRB v. Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the *de minimis* doctrine. Since, as the Court pointed out in *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517 (1942), and *Walling v. Jacksonville Paper Co., supra*, the Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act, it is clear that this doctrine could be applied to the present case.

In determining whether the *de minimis* doctrine should be applied to cases arising under the Fair Labor Standards Act, it is essential to keep in mind the purpose of the Act. As this Court has stated, "the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced under the prescribed or better

labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local business by competition made effective through interstate commerce." *United States v. Darby*, 312 U. S. 100 (1941) at page 122. On the record herein, it is plain that the trifling out of state circulation which is purely incidental to respondent's local service could not possibly have a substantial economic effect on interstate commerce. The papers going out of state do not compete with the local newspapers in the communities they enter and could not possibly impair or destruct the business of those newspapers. It does not fall within the category of competition by a small part which may affect the whole which this Court held to be covered by the Act in *United States v. Darby, supra*.

With the purpose of the Act in mind, the cases cited by the petitioners on pages 38-39 of their brief may be distinguished from the present case.

Dorner v. Iaco Clothes, Inc., 7 Wage and Hour Reporter 35 (N. D. Illinois, December 24, 1943), is not controlling here for the court recognized that there would be cases arising under the Act in which the *de minimis* doctrine would be applied but stated that it could not be applied there where a "substantial part" of the employer's products flowed in interstate commerce. Likewise, it was not applicable in *Walling v. Partee et al.*, 6 Wage and Hour Reporter 863 (M. D. Tennessee, May 26, 1943) where 15.16 per cent of the company's products went out of state nor in *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tennessee, May 3, 1940) where a substantial part (over 20 per cent) of the products of the company and its parent company were destined for interstate commerce.

In *Chapman v. Home Ice Co.*, 136 F. 2d 353 (C. C. A. 6th, 1943), the court did not specifically discuss the *de minimis*

doctrine but held that the employees were covered because a "substantial portion" of the ice produced was sold for use in interstate commerce. And, in *Muldowney v. Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. New York, June 4, 1941), the court said that, while the volume of out of state business was small as compared with the whole, it was substantial. In *Philips v. Star Overall Dry Cleaning Co.*, 7 Wage and Hour Reporter 92 (S. D. New York, January 6, 1944), the court held that employees of a laundry were substantially engaged in production of goods for commerce because the laundry obtained 80 per cent of its business from another company which was engaged in interstate commerce to the extent of five per cent of its business.

In *Davis v. Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4th, 1943), defendant's chief business was a retail lumber business but it also operated a small manufacturing business, 25 per cent of whose products were shipped in interstate commerce. The court held the manufacturing business was covered by the Act. A similar situation was presented in *Elmore v. Cromer & Beaty Co., Inc.*, 6 Wage and Hour Reporter 861 (W. D. South Carolina, August 2, 1943).

The court pointed out in *Strand v. Garden Valley Telephone Co.*, 6 Wage and Hour Reporter 1087 (D. C. Minnesota, September 27, 1943) that the defendant was not operating a fundamentally intrastate business having minor incidents of interstate commerce but was directly and immediately engaged in the business of interstate communication, holding himself out to the public as such. The Appellate Division distinguished *Schmidt v. The Peoples Telephone Union of Maryville*, 138 F. 2d 13 (C. C. A. 8th, 1943), from the case at bar on the same ground.

In *Ling v. Currier Lumber Co.*, 50 F. Supp. 204 (E. D. Michigan, April 2, 1943), the court said that where a company is engaged in interstate commerce every employee who

contributes to production is covered but where a company is engaged in intrastate business and has only casual connection with interstate business the *de minimis* doctrine applies unless the employee can show a substantial part of his labors was utilized in interstate commerce. It was this distinction the court was referring to in the statement quoted on page 40 of petitioners' brief. And, in *McKeown v. Southern California Freight Forwarders*, 52 F. Supp. 331 (S. D. California, September 29, 1943), *Drake v. Hirsch*, 40 F. Supp. 290 (N. D. Georgia, August 8, 1941), and *Nelson v. Southern Ice Co.*, 1 W. H. Cases 787 (N. D. Texas, September 27, 1941), the court, in each case, found that a substantial part of the employee's time was spent in the interstate part of the employer's business.

On the other hand, in a number of cases arising under the Act, the courts have applied the *de minimis* doctrine by holding that where the interstate business of the employer constitutes only a small portion of the entire business, where it has no substantial effect on interstate commerce, and where it is not an integral part of the service rendered the Act does not apply. *Goldberg v. Worman*, 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Rauhoff v. Henry Gramling & Co.*, 42 F. Supp. 754 (E. D. Arkansas, August 22, 1941); *Zehring v. Brown Materials*, 48 F. Supp. 740 (S. D. California, January 19, 1943); *Cron v. Goodyear Tire & Rubber Co.*, 49 F. Supp. 1013 (M. D. Tennessee, April 28, 1943); *Sapp et al. v. Horton's Laundry*, 56 F. Supp. 901 (N. D. Georgia, January 18, 1944); *Cody et al. v. Dossin's Food Products*, 8 Wage and Hour Reporter 989 (E. D. Michigan, October 5, 1945.)

The Appellate Division was correct in following this line of cases and in distinguishing the present case from cases in which the courts have refused to apply the *de minimis* doctrine because the interstate business, although small in amount, had a substantial effect on interstate commerce.

and was an integral part of the business. The opinion shows that the Appellate Division carefully analyzed these two lines of cases and recognized the essential difference between the two. It recognized that the present case would come within the *de minimis* doctrine because the out of state circulation was not an essential part of the service respondent rendered its local subscribers.

Here, as the Appellate Division found, respondent "had no desire and made no effort to secure 'out-of-state' circulation, although during the summer its newspaper was mailed to subscribers who were temporarily out of the State on vacation or absent from the State while at school or in the armed forces." It correctly held that this interstate business was "not regular but casual; not an integral but only an incidental part of its essentially local service." The Court of Appeals correctly upheld this ruling.

POINT II

No credence should be given to petitioners' claims which bear every earmark of an afterthought manufactured for the occasion.

The recoveries allowed by the Trial Court should not be reinstated because there was not sufficient evidence to support petitioners' claims or the Trial Court's findings.

In employees' suits to recover overtime wages under the Act herein the courts have uniformly applied the well established rule that the burden of proof rests upon the plaintiff who must establish by a preponderance of evidence the facts of overtime and the amount of overtime worked each week. New York state courts have so held, *Ralston v. Karp Metals Products Co.*, 179 Misc. 282, 38 N. Y. S. 2d 764, 2 W. H. Cases 1057 (New York Supreme Court, Kings County, November 17, 1942) and *Rosen v. Weismann*, 2 W. H. Cases 1055 (New York City Court, Kings County, November 17, 1942); federal courts have so held, *Jax Beer Co. v. Redfern*,

124 F. 2d 172 (C. C. A. 5th, 1941); *Lowrimore v. Union Bag & Paper Corporation*, 30 F. Supp. 647 (S. D. Georgia, November 15, 1939); *Wilkinson v. Noland Co.*, 40 F. Supp. 1009 (E. D. Virginia, September 30, 1941); *Feldman v. Roschelle Brothers, Inc.*, 49 F. Supp. 247 (S. D. New York, December 30, 1942); *Collins v. Burton-Dixie Corporation*, 53 F. Supp. 821 (W. D. South Carolina, February 15, 1944); *Toppin v. 12 East 22nd Street Corporation*, 55 F. Supp. 887 (S. D. New York, January 12, 1944); *Griswold v. Roscnstock*, 8 Wage and Hour Reporter 1039 (S. D. New York, October 15, 1945).

In this case, petitioners failed to sustain the burden of proof as defined by the courts of New York and the courts generally. The Trial Court erred (a) in finding that "by a fair preponderance of the believable evidence" petitioners performed overtime services for respondent and that the minimum overtime hours they claimed were actually spent in the course of their employment and (b) in disregarding the substantial evidence to the contrary as it appeared on the face of the specious claims of petitioners and from their testimony.

It should be constantly borne in mind that the trial developed a wide discrepancy between the claims advanced in the amended complaint and in the proof offered by petitioners. Throughout the entire period of the trial this substantial variance between allegation and proof left the evidence as to the claimed overtime in an indefinite, vague and speculative state. Respondent objected to the admission of such evidence as lacking in rational probative force and at all times met the duty of refuting the specious claims by showing that they were utterly improbable, unreasonable, and therefore entitled to no credence.

Irrespective of whether, as the Trial Court said, the method of proof adopted by petitioners was the only method by which they could attempt to establish their claims for

overtime or that no superior evidence was available or procurable—which respondent does not admit but which may be assumed *arguendo*—it still remains true that upon petitioners rested the burden of establishing their claims by a preponderance of credible evidence. This burden they plainly failed to meet.

The Trial Court also erred in saying that

“Defendant (respondent) cannot be heard to complain for its own admitted neglect or refusal to obey the statute and make, keep and preserve accurate records of the wages and hours of plaintiffs (petitioners).” 41 N. Y. S. 2d, at page 538:

Petitioners must recover on the strength of their own case. In *Feldman v. Roschelle Brothers, Inc., supra*, the court said:

“While the law requires the defendant to keep a record of overtime, the failure of the defendant to so do is not evidence upon which I can compute these plaintiffs’ overtime. The burden was on these plaintiffs to prove that they worked overtime and how much overtime they worked. The evidence as to the claimed overtime for any of the periods is vague, uncertain and does not carry the quality of proof to induce conviction. I cannot make a guess as to when the plaintiffs worked overtime or for how long.” (49 F. Supp. at pages 249-250.)

The court accordingly dismissed the complaint. See also, *Wilkinson v. Noland Co., supra*; *Collins v. Burton-Dixie Corporation, supra*.

In the *Ralston* case, *supra*, the court was not satisfied from the evidence and the circumstances surrounding the trial that the respondent had met the burden, saying that the employee

“kept no record of the hours he claims he worked each week and accepted his wages without protest, and for four years delayed asserting his claim.”

• • • • • • •

"Assuming *arguendo* that there were times when plaintiff worked more than the specified hours fixed by law, the testimony given by him is indefinite and at most a mere estimate based upon an alleged course of conduct or overall average a number of years back."

The court granted appellant's motion for judgment dismissing the complaint on the merits.

In the *Rosen* case, *supra*, Judge Russell, Official Referee, gave judgment for defendant, saying:

"Plaintiff brought this action without prior claim or indication of the existence of a claim, nearly a year after his employment terminated. He produced no records whatsoever of any alleged overtime, relying only on vague, general and wholly speculative testimony that he always worked more than the number of hours provided for in the contract [54 hours, no provision for overtime].

• • • • •
 "This claim bears every earmark of an afterthought manufactured for the occasion. The computation in the complaint and in the bill of particulars, the time element for the various days being computed wholly from plaintiff's memory at a period of over a year after his discharge, is based upon alleged overtime of exactly the same number of hours each week, manifestly impossible, bearing in mind that plaintiff was employed on a route of which the amount of business fluctuated from day to day. • • •

"Even under the strict requirements of the Fair Labor Standards Act, the courts have held that where an employee makes no claim for overtime compensation until after his discharge, such claim will be carefully scrutinized and proof will be required on the part of the employee of specific instances of overtime actually spent during a workweek, based upon contemporaneous records or other definite proof."

Whether credibility is for the judge or for the jury, the principles that "The law demands proof and not mere surmises" and that "insufficient evidence is, in the eye of the law, no evidence" should govern. Compare remarks of Mr. Justice Cardozo in *Matter of Case*, 214 N. Y. 153, 203 (1915); *Bond v. Smith*, 113 N. Y. 378, 385 (1889).

Neither a judge nor a jury should be left to guess or conjecture.

Nor is credibility dependent upon the number of witnesses or the mere quantity of evidence.

It will be recalled that each one of the petitioners in this case in his complaint claimed that he worked at least a certain definite number of hours above the maximum limit of the law each week during the period of the controversy; that no credit was given to the employer for the two weeks vacation with pay given to each employee each year during his employment; that no credit was given to the employer for the seven specified holidays in the year; that no credit was given to the employer for time taken off on account of illness during which each petitioner was paid when away from the office on account of illness.

None of petitioners had kept any current records of his employment during the time of his employment and none of them was able to produce any such records. Each on cross examination testified that such tabulations as he offered in support of his claims were prepared after the filing of the suit and largely on the basis of memory while checking the files of respondent's newspaper, the White Plains Daily Reporter.

These tabulations admitted into evidence over objection are particularly revealing in many respects. To illustrate: With the exception of the petitioner Trow each and every one of the petitioners claimed an even number of hours overtime on each one of his claimed overtime assignments. Trow broke certain of his assignments down to half hour

periods. Yet the record is undisputed that newspaper work is not performed in that way. It is also undisputed that no two men would spend exactly the same amount of time on identical stories or that a particular story would take exactly one-half hour, one hour, two hours, three hours, four hours or any particular number of hours to cover.

Petitioner O'Donovan's claims as to overtime as illustrated by Plaintiffs' Exhibit No. 18 are fantastic.

Mr. O'Donovan spent his entire newspaper career in White Plains with respondent. Starting in as a reporter, he rose to the position of City Editor which position he held throughout the period in controversy. He was active not only in military affairs during peacetime but in civic affairs. Concurrently with his service on respondent's newspaper he served in the New York State National Guard and just as he advanced on the newspaper from cub reporter to City Editor, he advanced in the Guard from private to Captain and Adjutant of his regiment. He testified that he was a member of the Citizens Committee on Housing, the County Airport Committee, the Advisory Board of the Symphony Orchestra, the Civic and Business Federation, the White Plains Defense Council, as well as several Republican Clubs (R. 292-293). He further testified that the only reason he belonged to any of these, except the White Plains Defense Council, was because of his service on the newspaper.

In addition to attending meetings of the foregoing organizations O'Donovan frequently spoke before other bodies in White Plains and the newspaper stories covering his speeches and his activities referred to him as "Captain W. L. O'Donovan, City Editor of the White Plains Daily Reporter."

At no time while he was employed by this newspaper did he ever make a claim for extra compensation or overtime

pay because of his civic and military activities. It was not until nearly two years after his discharge in December, 1940, that he filed the suit herein and it was not until more than two years after his discharge that he attempted to reconstruct any records on which to base his claim. He admitted on the stand that he had kept no current records and that his tabulation of overtime claims was worked out in the method heretofore described. Furthermore, when that tabulation was offered in evidence, Mr. O'Donovan specifically testified that he did not charge time spent on the White Plains Defense Council to the newspaper but that he did charge the time spent in his civic activities to the newspaper in the claim he presented to the court below.

Examination of Plaintiffs' Exhibit No. 13, which is O'Donovan's purported tabulation of overtime, reveals that on August 13, 1940, he spoke before the Rotary Club on National defense and on August 14, 1940, he spoke before the Exchange Club on National defense and more than two years after sought to charge three hours overtime for those speeches. This exhibit further shows that he attended a meeting of the Defense Council on August 21 and lists one hour overtime incident to that. The exhibit still further shows that during the week August 22-28 he attended several Defense Council meetings at night and the exhibit claims 12 hours overtime for those meetings. Going back to 1939 and before the National defense situation became particularly acute the same exhibit shows that on January 19, 1939, Mr. O'Donovan was a guest at a dinner given in honor of Major George Fielding Eliot, a noted military authority and commentator. He said nothing to his employer about extra compensation for attending that dinner at that particular time but more than four years later he comes into court, notwithstanding his alleged peace time interest in military affairs and national defense, and asserts a claim for two hours overtime incident to the Eliot

dinner. Of course, the record shows that Mr. O'Donovan resigned his commission in the Guard after it became known that the Guard was going to be called into active service and just a few weeks before it actually was called.

On direct examination O'Donovan testified that he attended many meetings in behalf of his employer, respondent herein, but that:

"I have taken no credit or made no claim for over-time except for the time spent in the office preparing the stories or otherwise, as far as the activities affected the Daily Reporter" (R. 294).

On page 519, Exhibit 13, O'Donovan claims two hours overtime for attending a Federation Dinner on January 23, 1940. Under that claim appears this note: "Norton Mockridge wrote story."

Mockridge, another petitioner, filed a similar tabulation in support of his claims for overtime (Plaintiffs' Ex. 5). Reference to the Mockridge exhibit shows that he claims two hours overtime incident to his writing the story of that particular Federation Dinner. Courtney M. Mabree, another petitioner, also filed a similar exhibit tabulating his claims of overtime (Plaintiffs' Ex. 3). Reference to page 3 of the Mabree exhibit shows that he claims four hours overtime for attending the self same dinner. Two queries naturally present themselves:

1. If as O'Donovan testified he only charged the time he spent in the office writing the story why did he make this claim for this particular dinner?

2. What did Mabree do to justify a claim of four hours overtime for attending the same dinner when according to O'Donovan's exhibit that was not challenged by either Mabree or any other petitioner Mockridge also attended the dinner and actually wrote the story?

The record is undisputed that each one of the employees who are petitioners in this case was free to come and go as he pleased and to cover his assignment according to his own best judgment.

Their exhibits reveal some further interesting facts on their method of covering assignments. Q'Donovan was the City Editor of the paper and Mabee for a time during the period in controversy the Assistant City Editor. On the very first day the law became effective—October 24, 1938—Mabee claims (Plaintiffs' Ex. 3) four hours overtime for attending a rally in support of Judge Bleakley of Westchester County who was then the Republican candidate for governor of New York, while O'Donovan claims one hour overtime for attending the same rally (Plaintiffs' Ex. 13). On November 28, 1938, Mabee claims he spent five hours overtime attending the County Budget hearing (Plaintiffs' Ex. 3) whereas O'Donovan claims three hours for the identical assignment (Plaintiffs' Ex. 13). On December 15, 1938, a dinner was given in honor of the football squad of the White Plains High School. Various members of the newspaper staff attended that dinner and O'Donovan was toastmaster. O'Donovan claims five hours overtime for attending the dinner and acting as toastmaster (Plaintiffs' Ex. 13). Other similar instances can be found throughout these exhibits, the foregoing of which are just illustrative of the type and nature of the claims made by the petitioners.

Walter V. Hogan, Vice President and Treasurer of respondent company and Editor of its newspaper during the period in controversy was ill during several months of 1939. While he was away the petitioner O'Donovan was in full and complete charge of the editorial and news departments of the newspaper. Hogan was away four weeks during February and March and 15 weeks beginning May 1 on account of illness (R. 367). O'Donovan never presented a

claim for overtime during these periods or until he filed his suit. He never specified the overtime he claimed to have worked until he took the stand. He now seeks a vast amount of overtime pay for work he claims he did while one of the chief executives of the paper.

At all times O'Donovan laid out the work of others as well as what he did and never during the entire period in controversy received specific assignments from the Editor (R. 363).

In *Mt. Clemens Pottery Co. v. Anderson*, 149 F. 2d 461 (C. C. A. 6th, 1945), the Circuit Court of Appeals reversed a decision of the District Court granting a judgment for overtime pay alleged to be due under the Act. The District Court had reversed the findings of the Special Master that the plaintiffs had not established by a fair preponderance of evidence a violation of the Act and had applied an arbitrary formula for establishing the overtime worked. The Circuit Court said:

“ * * * the burden rested on each of the plaintiffs here * * * to show by evidence, not resting upon conjecture, the extent of overtime worked. It does not suffice for the employee to base his right to recovery on a mere estimated average of overtime worked. To uphold a judgment based on such uncertain and conjectural evidence would be to rest it upon speculation” (149 F. 2d at page 465).

And, in *Epps v. Weathers*, 49 F. Supp. 2 (S. D. Georgia, January 11, 1943), where the plaintiffs had not kept any records of overtime but tried to recall the overtime worked during a period of four years, the court dismissed the complaint, saying

“The burden is in the plaintiffs to establish by a preponderance of the evidence the number of hours worked and the amount of wages due; and the evidence to sustain this burden must be definite and certain.

• • • Not only is their evidence as to the hours they worked unconvincing, but I think it would be impossible for them to remember how long or how often they worked in the absence of some record made contemporaneously." (49 F. Supp. at page 5.)

Likewise, in *Toppin v. 12 East 22nd Street Corporation*, *supra*, where the plaintiffs had delayed in presenting any claim for overtime, the court found that they had not offered sufficient proof of overtime to recover. The court said:

"Such delay is so indicative of the claim in suit being unfounded that, in order to establish the contrary, clear and convincing proof is demanded." (55 F. Supp. at page 889.)

In this case the evidence is undisputed that none of the petitioners herein kept any records of his hours at the time he was employed; that none attempted to reconstruct any such records until after suit was filed; and that all of them made such reconstructions as they attempted chiefly on the basis of memory. Mabee in fact said there were no records except in his head (R. 106). He admitted organizing the suit and assisting the other petitioners (R. 98).

Mabee testified that there were only about nine employees in the news room (R. 46) and that when an employee was discharged no one was hired to replace him (R. 61). The record shows without dispute that the number of employees ranged from 13 to 16 at all times during the period in controversy and that when discharges were made new employees were hired (R. 154-156). The record further shows that the number of employees in the news department for a paper the size of respondent's newspaper was much larger than average (R. 449). And still further that the work of each could have been done within a 40 hour week (R. 366; 423; 425-426) and that O'Donovan was directed to keep the men within 40 hours (R. 366-423).

As has hereinbefore been pointed out and as is illustrated by the exhibits offered by petitioners, two, three and even four of these employees would go to the same event. None of them claimed overtime during the period of his employment or kept any record of the time spent whether on business for respondent's newspaper or for his personal pleasure. Yet more than eighteen months after respondent's newspaper suspended publication, petitioners came in and made these fantastic claims. Again the record shows that such duplicate coverage was wholly unnecessary (R. 368).

The record shows that each one of the petitioners based his claims for overtime on the basis of a workweek of 40 hours even when the law was 44 and 42 hours.

When petitioners admitted, as each and every one of them did on the stand, that they kept no time records, that they had not attempted to reconstruct any records until after they filed this suit and then only in anticipation of trial and out of their heads, there was no occasion for respondent to combat such testimony other than by bringing out the facts as to the speciousness of petitioners' claims through their own mouths and their own exhibits.

POINT III

The recoveries granted by the Trial Court should not be reinstated because the computation of overtime was incorrect.

Even if this Court should reverse the Court of Appeals of New York, it should not reinstate the recoveries granted by the Trial Court.

The Trial Court rendered judgment in favor of each of the petitioners for their claimed overtime compensation in a sum for each computed to include (a) the amount of claimed overtime at the rate of one and one-half times the

regular rate at which each petitioner was employed, "regular rate" being construed by the Trial Court to be the employee's weekly salary divided by forty hours, *plus interest*, plus an additional equal amount as liquidated damages, and (b) attorney's fees and costs.

The recoveries of interest cannot be reinstated for this Court held last term in *Brooklyn Savings Bank v. O'Neil, supra*, that interest is not recoverable on judgments obtained under Section 16 (b).

Moreover, the recoveries for overtime cannot be reinstated because in approving petitioners' method of computing overtime the Trial Court misconceived the effect of the interpretation of Section 7 of the Act by this Court in *Overnight Motor Transportation Co. v. Missel, supra*.

Petitioners' "compilations" of overtime hours worked and of amounts alleged to be due, inclusive as they are in fact, are in addition wholly inadequate as a matter of law.

Section 7 (a) of the Act provides that no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than prescribed unless such employee receives compensation for excess hours

"at a rate not less than one and one-half time the regular rate at which he is employed."

This Court in *Overnight Motor Transportation Co. v. Missel, supra*, has established the method of determining regular rate of pay in the case of employees who work a varying number of hours each week on a fixed weekly salary basis. For such employees, regular rate of pay equals the weekly salary in any particular week divided by hours actually worked in that week.

Petitioners adopted another method. Instead of using for a divisor hours alleged to have been worked in each of the weeks in controversy as required by the Act, petitioners

used the figure of 40 hours for all weeks because, as Mabce testified, "that was the workweek we were supposed to have in reporting" (R. 83). Notwithstanding this Court's ruling in the *Missel* case, Judge Hinkley upheld this method.

A single example will suffice to show the gross error in petitioners' method of computation.

O'Donovan claimed to have worked a total of 63 hours during the week October 27, 1938, to November 2, 1938. During the same period O'Donovan's salary was \$105 per week.

If petitioners' method of computation were followed, O'Donovan's regular rate of pay would be \$2.63 per hour ($\$105.00 \div 40$) and the overtime rate would be \$1.32. For the 19 hours of overtime, then, petitioner O'Donovan demands \$75.05 ($19 \times \3.95).

Under the rule of the *Missel* case, however, the amount due for such alleged hours of overtime is \$15.96, computed as follows:

$$\$105 \div 63 = \$1.67, \text{ regular rate of pay.}$$

$$\$1.67 \div 2 = \$.84, \text{ overtime rate of pay.}$$

$$19 \times \$.84 = \$15.96, \text{ unpaid overtime.}$$

It is thus apparent that failure to follow the rule of this Court in computing overtime results in an excess demand for a single petitioner for a single week in the sum of \$59.09, or \$118.18 with the addition of liquidated damages as demanded.

The Trial Court erred in holding that respondent had entered into contracts of employment with petitioners that each employee's salary should be for a forty hour week and that, therefore, each employee was employed at a basic hourly rate which could be determined by dividing the weekly salary by forty. Each contract of employment was, in fact, an agreement that each employee was to be paid a certain sum each week regardless of the hours he worked.

The hours worked each week fluctuated because of the nature of respondent's business and because of the methods petitioners used in doing their work. Petitioners, therefore, were employed at a basic weekly salary for a varying work week so the *Missel* rule should have been applied to determine the basic hourly rate each petitioner was paid.

This is substantiated by later decisions of this Court and by decisions of district and circuit courts of appeals in which the *Missel* rule has been followed. See, *Landreth v. Ford, Bacon & Davis*, 147 F. 2d 446 (C. C. A. 8th, 1945).

POINT IV

The Act Contains a Particular Form of Abridgment of the Constitutional Guaranty of a Free Press

The Appellate Division found that it was unnecessary to pass upon the constitutional issues in this case because of its finding that none of the plaintiffs was engaged either in commerce or in producing goods for commerce. There can be no controversy with that finding. Even so, the attempted application of the Act does raise important constitutional questions which were submitted to the courts below and they will be discussed briefly.

One of these is whether Congress in the exercise of its regulatory powers derived from Article I, Section 8, Clause 3 of the Constitution can nullify the prohibition against restraints of the press embraced in the First Amendment to the Constitution.

The Act here in controversy is not a general law affecting all persons alike. Section 13 of the Act exempts many types of employees from the so-called "benefits" of the Act. Furthermore, it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of

business and industry was classified in this Act for the purposes of regulation.

That business was the newspaper publishing business.

Under the provisions of Section 13 (a) (8) all weekly and semi-weekly newspapers with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published, are exempted from the minimum wage and overtime provisions of Sections 6 and 7 of the Act. All other newspapers whether weekly, semi-weekly, tri-weekly, daily, Sunday or daily and Sunday are subjected to the burdens of Sections 6 and 7 of the Act.

The record shows that of a total of 13,476 newspapers published in 1938, daily, daily and Sunday, weekly, semi-weekly and tri-weekly, 13,379, or 77 per cent of the total, had circulations under 3,000, while 11,496, or 85 per cent of the total, had circulations under 5,000. In the weekly, semi-weekly, and tri-weekly fields 9,775 or 91 per cent of the total in these fields, had circulations under 3,000. In the daily field 521, or 25 per cent of all dailies, had circulations under 3,000 and in the Sunday field 101, or 17 per cent of all Sundays, had circulations under 3,000.

In the group between 3,000 and 5,000 circulation, 489 were weeklies and 467 dailies.

In the group between 5,000 and 10,000 circulation, 233 were weeklies, semi-weeklies and tri-weeklies and 455 dailies. Only 654 dailies and 218 weeklies, semi-weeklies and tri-weeklies had over 10,000 circulation. Practically all of 9,755 weekly and semi-weekly newspapers have less than 3,000 circulation. These, constituting 72 per cent of all newspapers published in the United States and 91 per cent of all weekly and semi-weekly newspapers published in the United States, are exempted from the burdens of the Act (Defendants' Exhibit A—Small Daily Newspapers Under Fair Labor Standards Act).

Analysis of the provisions of Section 13(a)(8) shows that Congress classified the press for the purposes of the regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution.

A general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment. *Murdock v. Pennsylvania*, *supra*.

This Act lays a direct burden on the press. The business of preparing and printing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation. If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict their circulation. Respondent could have removed itself wholly from the possible application of this law by eliminating its few out-of-state subscribers. Thus, the effect of the application of this Act to the newspaper publishing business is to restrict circulation. Restriction of circulation violates the guaranty of the First Amendment. *Lovell v. Griffin*, 303 U. S. 444 (1938); *Schneider v. State*, 308 U. S. 147 (1939); *Near v. Minnesota*, 283 U. S. 697 (1931); and *Grosjean v. American Press Co.*, *supra*.

This Act regulates the press by classifying it. If Congress has the power to classify the press as it has done here it can exercise that power so as to benefit or burden any portion of the press it so desires. This is obvious from the very nature of the factors used by Congress for its classification.

The use of one of these factors, the only one used in fact by the State Legislature of Louisiana, was condemned by this Court in *Grosjean v. American Press Co.*, *supra*.

The notorious Huey Long legislature when it sought to penalize those newspapers in Louisiana which were opposed to the Long regime enacted a tax law aimed at silencing the anti-Long press. The legislature classified the press of Louisiana on the single basis of volume of circulation, levying the tax on all newspapers with a circulation in excess of 20,000 per week and exempting all newspapers in Louisiana with a circulation of less than 20,000 per week.

In this Act Congress has not only applied volume of circulation as used by the Louisiana legislature as one of its factors for classifying the press but has added two more, namely, frequency of issue and the area in which a newspaper is distributed. The very use of these factors serves to restrict circulation and deprive the people of their right to information which our forefathers guaranteed them under the First Amendment.

That Amendment prohibits any such exercise of the power here asserted by Congress.

POINT V

Application of Sections 6 and 7 of the Act to respondent's business would constitute an unreasonable, arbitrary and injurious discrimination against respondent in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution, in conflict with the principles announced in Grosjean v. American Press Co., supra.

As has been pointed out hereinbefore Section 13(a)(8) of the Act classifies the press on the basis of volume of circulation, frequency of issue and area of distribution in such a way as to exempt from the burdens of Sections 6 and 7 more than 72 per cent of all newspapers published in the United States.

Among the newspapers freed from those burdens are many weekly newspapers published in the vicinity of White

Plains. The newspaper published by respondent was engaged in identically the same business as the weekly newspapers with circulations of less than 3,000 with which it competed. Whether a newspaper be weekly, semi-weekly, tri-weekly, daily, daily and Sunday or Sunday only, its business is exactly the same as that of all other newspapers. That business is the gathering and dissemination of three classes of information in the printed form—news, editorial comment and advertising. Mere size affords no basis for regulating certain newspapers and exempting all others.

Therefore, it follows that the application of Sections 6 and 7 to respondent's business would constitute an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution and in conflict with the principles announced in *Grosjean v. American Press Co.*, *supra*.

POINT VI

Petitioners were exempt from the provisions of the Act herein as professional employees within the meaning of Section 13 (a) (1).

Even if this Court should hold that respondent were subject to the Act it should hold that petitioners are not entitled to recovery because they were exempt from its provisions as professional employees within the meaning of Section 13 (a).

Section 13 (a) (1) of the Act herein provides that Section 7 shall not apply with respect to

“any employee employed in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator).”

Under this provision of law the Administrator of the Wage and Hour Division has asserted a vast power over

the very existence of the newspaper publishing business. Through his regulations he has asserted power so to define types of employees intended by Congress to be exempt as to deny the intended exemption to an entire business or industry.

The Administrator's regulations have proved unworkable. As applied to the newspaper publishing business the definitions are arbitrary, capricious and unreasonable.

It is submitted that the Trial Court erred in holding that no one of the petitioners performed services which bring them within the exemption of Section 13 (a) (1) of the Act. It should also be noted that in effect the Trial Court gave the Interpretative Bulletins of the Wage and Hour Division the force of law rather than weight and persuasiveness.

For example, it has been held that the Administrator exceeded the powers conferred on him by so defining executive employees as to deny exempt status to any employee regardless of the nature of his duties who earns less than \$30.00 per week. *Devoc v. Atlanta Paper Co.*, 40 F. Supp. 284 (N. D. Georgia, July 31, 1941); *Tune v. Roselawn Florists*, 1 W. H. Cases 784 (N. D. Texas, September 24, 1941); *Buckner v. Armour & Co.*, 53 F. Supp. 1022 (N. D. Texas, July 22, 1942).

Petitioners at all times during the period in controversy were in fact engaged in professional work.

The work was predominantly intellectual in character. Each petitioner used his educational background and his acquired intimate knowledge of local affairs in order to bring to his readers an intelligent report and interpretation of the news events of the day. Each petitioner exercised both literary skill in translating events to written form and news judgment in assessing the space value of news.

Petitioners' work was varied in character as opposed to routine mental, manual, mechanical or physical work. News is constantly changing from day to day. Petitioners

probably had as much variety in the news stories they handled each day as in the cases which the physician or lawyer may handle in any given day.

The work of each petitioner required the constant exercise of discretion and judgment. Petitioners had a wide range for the exercise of discretion and individual judgment (R. 158; 190). They were not given detailed instructions on the methods of accomplishing their assignments (R. 275) nor explicit directions as to the amount of time to be consumed in gathering facts (R. 87; 158). They were required only to meet the 1:30 deadline.

Those petitioners who edited the news gathered by others constantly had to use discretion in determining what facts should be brought into the lead, what facts were essential to the story and what might be eliminated. Each used his literary ability in fashioning the story as reported into a finished chronicle. Even in the writing of heads, it was necessary to employ trained judgment as to news value and individual style in compressing the facts into the narrow limits of a headline (R. 81-83). It is the individual skill and judgment applied to each assignment or story which determines professional character.

Nor was petitioners' work of such character that the output produced or the result accomplished could be standardized in relation to a given period of time. The employees in respondent's mechanical department could be expected to set so many lines of copy per day. Not so the petitioners. Mabee or Barnum according to their testimony might spend many hours on a single assignment and return with a story amounting to only a few words (R. 81; 190). They might spend only a few minutes gathering the material for a story several times that length. Barnum testified that before reaching the office he might spend several hours covering police stations, hospitals and

other public news sources without discovering a single newsworthy event (R. 166).

Mabee while editing the incoming news at the copy desk might spend an hour on one story and the next hour on a dozen shorter stories. His work would depend upon the uncontrollable breaks of the news.

It is thus apparent that irrespective of the Regulations of the Administrator, petitioners were in fact engaged in work of a professional character. At the time of the enactment of the Act, it was generally recognized that employment in the field of gathering, writing and editing news is professional in character. If the Administrator's definitions fail to recognize that fact, they pervert the intention of Congress to exempt from the operation of the Act all professional employees and thus exceed the scope of the powers delegated.

Petitioner O'Donovan was exempt from the wage and hour provisions of the Act as an executive as well as a professional employee. As City Editor he was responsible to his employers for managing the preparation of the news pages of the Reporter for each day. During a long period of time when the Editor was away on account of illness he was in complete charge of all the editorial content of the newspaper including the editorial page as well as the news pages. He gave assignments to the reportorial staff in the gathering of news either himself or by delegating authority to Mabee, the Assistant City Editor. O'Donovan's recommendations on hiring and firing and on salary questions were generally accepted by the Editor. He consistently exercised discretion in carrying out the policies of the newspaper and owned a small amount of stock in respondent company.

Petitioner Mabee during the greater portion of the period involved in this action was Assistant City Editor. Under

the authority delegated to him he gave assignments to reporters (R. 78) and handled many details for the executives including the disposition of complaints and the transaction of other matters of business (R. 45-46, 68). Under only general supervision, he directed the work of members of the news staff at all times, even when he ceased being Assistant City Editor and became Sports Editor in which position he had an assistant whose work he supervised and to whom he gave assignments (R. 95).

In the light of the foregoing facts, Mabee was an employee engaged in an administrative capacity and exempt from the operation of Section 7 of the Act.

It is therefore submitted that each and every petitioner was at all times exempt from the operation of the Act by reason of the provisions of Section 13 (a) (1) thereof.

Conclusion

Wherefore, it is respectfully submitted that the judgment of the Court of Appeals of New York should be affirmed and the complaint of petitioners herein dismissed.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 3, of the Constitution of the United States and the First and Fifth Amendments of the Constitution of the United States.

Article I, Section 8, Clause 3, of the Constitution of the United States provides that:

“The Congress shall have power . . . to regulate Commerce . . . among the several States . . .”

The First Amendment to the Constitution of the United States provides that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The Fifth Amendment to the Constitution of the United States provides that:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

REGULATIONS OF THE ADMINISTRATOR

Pursuant to Section 13(a)(1) of the Act, the Administrator promulgated the following regulations defining and delimiting the terms “any employee employed in a bona fide executive, administrative, professional . . . capacity . . .”

Executive

The term "employee employed in a bona fide executive . . . capacity" in section 13(a)(1) of the act shall mean any employee:

(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(B) who customarily and regularly directs the work of other employees therein, and

(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(D) who customarily and regularly exercises discretionary powers, and

(E) who is compensated for his services on a salary basis at not less than \$30 per week (exclusive of board, lodging, or other facilities), and

(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

Administrative

The term "employee employed in a bona fide . . . administrative . . . capacity" in section 13(a)(1) of the act shall mean any employee:

(A) who is compensated for his services on a salary or fee basis, at a rate of not less than \$200 per month (exclusive of board, lodging or other facilities), and

(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) Whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

Professional

The term "employee employed in a bona fide . . . professional . . . capacity" in section 13(a)(1) of the act shall mean any employee who is:

(A) engaged in work:

(1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, and

(2) requiring the consistent exercise of discretion and judgment in its performance, and

(3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and

(4) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the hours worked in the workweek by the nonexempt employees; provided that where such nonprofessional work is an essential part of and necessarily incident to work of a professional nature, such essential and incidental work shall not be counted as nonexempt work; and

(5) (a) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

(b) predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination, or talent of the employee, and

(B) compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities); provided that this subsection (B) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying.

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.¹

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

¹ Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.¹

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).¹

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

¹ Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks;

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.¹

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS .

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

¹ Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress. 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

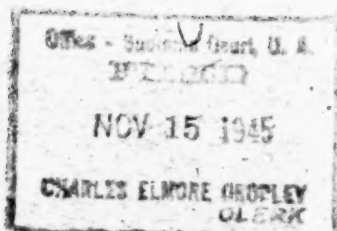
SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

FILE COPY



No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1945

**COURTNEY M. MABEE, CHARLES K. BARNUM, ED-
WARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE
S. TROW, WILLIAM L. O'DONOVAN, PETITIONERS**

v.

WHITE PLAINS PUBLISHING COMPANY, INC.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR
THE STATE OF NEW YORK**

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND
HOUR DIVISION AS AMICUS CURIAE**

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 57

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW, WILLIAM L. O'DONOVAN, PETITIONERS

v.

WHITE PLAINS PUBLISHING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR
THE STATE OF NEW YORK

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION AS AMICUS CURIAE

This is an employee suit under Section 16 (b) of the Fair Labor Standards Act. It raises the question of the applicability of the Act to employees of a small daily newspaper. The trial court (New York Sup. Ct., Spec. Term, Westchester Co.) held, upon a motion to dismiss, that respondent's newspaper is engaged in interstate commerce subject to the Fair Labor Standards Act and that the case should go to trial on the question of fact whether the activities of any of the plaintiffs related to the interstate business of

the newspaper (R. 89). After trial, the court found that the activities of the plaintiffs "related to interstate commerce" and that each of the plaintiffs was engaged "in [a] process or occupation necessary to the production" of goods for such commerce within the meaning of Section 3 (j) of the Fair Labor Standards Act (R. 89-90). The Appellate Division reversed the judgment "on the law and on the facts" on the ground that the newspaper and its employees "were not engaged in commerce within the meaning of the Act, and Congress never intended it to apply to the situation disclosed by this record" (R. 98). It stated that the newspaper was engaged in "a strictly local as distinguished from a national activity, i. e., the local business of publishing a local newspaper," that it "did not produce goods for commerce within the meaning of the Act and, consequently, plaintiffs were not engaged in any process or occupation necessary to the production thereof" (R. 99). The admitted out-of-State circulation, the Appellate Division ruled, was an "insignificant and inconsequential" part, "not a regular part" of the newspaper's business and that the doctrine of *de minimis* applied to render the Act inapplicable (R. 99, 100, 101). The continuous receipt of news, intelligence, advertising and other material from out-of-State sources was held insufficient to subject the newspaper to the Act, on the ground that the interstate movement of

such news and materials ended when they arrived at the newspaper's plant (R. 101-102).

The Court of Appeals affirmed the decision of the Appellate Division without opinion. In granting the motion to amend the remittitur the Court of Appeals stated that "there was presently and necessarily passed upon the question of whether the respondent [the newspaper] was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938," and that its decision was that the newspaper "was not engaged in interstate commerce or in the production of goods within the meaning of the Fair Labor Standards Act of 1938" (R. 105).

It is the Administrator's position that (1) respondent's newspaper is "engaged in commerce" within the meaning and intent of the Act by reason of its continuous receipt of news, intelligence, advertising and other matter from out-of-State sources, and its constant use of the channels of interstate communication, regardless of the amount of its out-of-State circulation; and (2) to the extent that the paper circulates out-of-State, it is engaged in commerce and in the production of goods for commerce within the scope of the Act, and such production is not outside of the scope of the Act as *de minimis* where the out-of-State circulation, however small, is a regular and recurrent part, as distinguished from casual, occasional or sporadic incidents of the newspaper's circulation.

In referring to the *newspaper* as being engaged in commerce and in the production of goods for commerce, we do not mean to imply that the nature of its business is determinative of the applicability of the Act to petitioners. It is recognized that the application of the Act is "dependent upon the character of the employees' activities." *Kirschbaum Co. v. Walling*, 316 U. S. 517, 524. The record shows that the petitioners here were all editorial or reportorial employees. At least some of them had regular duties in connection with the receipt and handling of news as it came over the teletype (R. 42-43, 51, 66, 67), and all of them presumably participated in the preparation of the paper, some copies of which circulated out of the State. This brief is written on the assumption that petitioners were engaged in such of the newspaper's activities as we claim were interstate commerce or the production of goods for commerce.¹ No attempt is made here to

¹ A particular employee may, of course, be entitled to the benefits of the Act in a particular work-week in which he spends a substantial amount of his time in covered work even though the employer's interstate business, in relation to its business as a whole, might not be a sufficiently regular part of its normal business to warrant coverage of other employees. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 572; *Walling v. Peoples Packing Co.*, 132 F. 2d 236, 240 (C. C. A. 10); *Montalvo v. Puerto Rico Tobacco Co.*, 6 Wage Hour Rept. 44 (D. P. R., 1943); *Keen v. Mid-Continent Petroleum Corp.*, 8 Wage Hour Rept. 1029, 1037 (N. D. Iowa, 1945).

answer the question whether each or any of the particular petitioners has adequately proved that he performed such activities to an extent sufficient to bring him within the scope of the Act. For convenience, therefore, the brief speaks in terms of the newspaper's activities rather than of employees' duties.²

² It is not clear from the opinion of the Appellate Division and the ruling of the Court of Appeals whether they recognized this principle or realized that the fact that the employer's business may be *substantially* local is not decisive. Conceivably some of petitioners may have been sufficiently engaged in work relating to respondent's interstate transactions to come within the scope of the Act, even should it be assumed that the business generally was local and that its production for commerce was *de minimis*. By the same token at times some of the petitioners may have been engaged in the interstate activities while other petitioners were not so engaged.

We think that the only practical means for determining this problem is the method outlined by the Fourth Circuit in the case of *Guess v. Montague*, 140 F. 2d 500, which appears to be the method impliedly recognized by this Court's decision in the *United States v. Darby*, 312 U. S. 100. The Fourth Circuit ruled that a *prima facie* showing, entitling the employee to the protection of the Act, is made where it appears that the interstate and intrastate activities are commingled in the employer's operations, and it is a fair inference from the evidence that the employee worked on the interstate as well as intrastate business; and that the burden is then upon the employer to produce evidence that certain employees "did not render any service in connection with its interstate business." 140 F. 2d at 504. See also Interpretative Bulletin No. 1, par. 5, 1942 Wage Hour Man. 24; Interpretative Bulletin No. 5, par. 9, 1942 Wage Hour Man. 28.

1. A DAILY NEWSPAPER SUCH AS THAT INVOLVED HERE IS ENGAGED IN INTERSTATE COMMERCE WITHIN THE MEANING OF THE ACT REGARDLESS OF THE AMOUNT OF ITS OUT-OF-STATE CIRCULATION

Respondent's newspaper, like practically all daily newspapers, involves continuous receipt of out-of-State news and advertising material and the "constant use of channels of interstate and foreign communications." See *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 128. For the greater part of the period involved in this suit (from March 1939 to January 1941) respondent subscribed to the International News Service, which maintained two teletype machines in respondent's newsroom (R. 28, 30, 38, 50-53, 66, 67). Prior to March 1939, respondent received the Associated Press Service over a tie-up wire with the County News Bureau (R. 50). The record clearly establishes that use of the national and international news received over these wires was particularly significant and extensive during the period involved in this suit because it was the period immediately preceding and following the outbreak of war in Europe (R. 53, 54).³ In addition to the teletype services, respondent-

³ When the war broke out the paper ran a full page advertisement stating that due to the fact that the war would influence everyone's life it would expand the international news and that the paper was "taking the service of the International News from March 1, 1939, and * * * would continue to give local news, but at the same time * * * would implement it with national and international news because of everyone's interest in world conditions" (R. 53).

ent subscribed to the usual run of comic strips, syndicated news features, feature stories and pictorial services (R. 31, 36, 54, 69), which came regularly from out-of-State sources (R. 31, 35, 37, 54). Also, the paper had the usual kind and amount of national advertising for which it received mats and other material from the Meyer Both national advertising agency in Chicago and the Basil Smith national advertising agency in Philadelphia (R. 57-58).

Respondent is engaged in interstate commerce within the meaning of the Fair Labor Standards Act by virtue of its constant and extensive utilization of the channels of interstate and foreign communications, and its function of receiving news and intelligence in a continuous stream from nationwide and worldwide sources (see *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 128; *Associated Press v. United States*, Nos. 57, 58, 59, October Term, 1944, slip op., p. 9), and also by reason of its continuous interstate traffic in syndicated news stories, pictorial services, advertising mats and materials and other supplies (see *Indiana Farmer's Guide Co. v. Prairie Co.*, 293 U. S. 268, 276; *International Textbook Co. v. Pigg*, 217 U. S. 91, 106-107), as well as by virtue of its out-of-State distribution.

The decision below in the instant case is the only decision under the Act which has rejected

these views. See *Sun Pub. Co. v. Walling*, 140 F. 2d 445, 448 (C. C. A. 6), certiorari denied, 322 U. S. 728; *Fleming v. Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. 2d 213 (C. C. A. 1), affirmed per curiam, 315 U. S. 784; *Fleming v. A. H. Belo Corp.*, 36 F. Supp. 907, 909 (N. D. Tex.), affirmed, 121 F. 2d 207 (C. C. A. 5), affirmed on other grounds, 316 U. S. 624. See also *Schroepfer v. A. S. Abell Co.*, 138 F. 2d 111 (C. C. A. 4), certiorari denied, 321 U. S. 763; *Walling v. Oklahoma Press Pub. Co.*, 7 Wage Hour Rept. 655 (E. D. Okla., 1944), affirmed on other grounds, 147 F. 2d 658 (C. C. A. 10), awaiting decision in this Court, No. 61; *Fleming v. Gazette Pub. Co.*, 4 Wage Hour Rept. 328 (N. D. Ohio), reversed by consent on the ground that administrative authority to issue a subpoena

*The reliance by the Appellate Division upon the *Schroepfer* case is misplaced. The Fourth Circuit explicitly recognized that some of the newspaper's employees were unquestionably engaged in interstate commerce. The first sentence of the court's opinion, immediately following the summary of facts, reads as follows (p. 113): "There is no question but that the defendant is engaged in interstate commerce with respect to the publication of its papers, the gathering of news therefor and the sale of the portion of its papers sent out of the state." The suit involved the coverage of newspaper rackmen whose only duties related to the delivery of papers to local distribution racks and who "had nothing to do with collecting news, assembling it, printing the paper, or any other activity in which interstate commerce was involved" (138 F. 2d at 112).

duces tecum is not delegable; *Walling v. Times Co.*, 7 Wage Hour Rept. 599 (S. D. Ohio, 1944).⁵

A newspaper engaged constantly in such interstate and foreign communications and business cannot fairly or realistically be characterized as a "strictly local as distinguished from a national activity" (see R. 99). As the detailed factual report on *Small Daily Newspapers*,⁶ p. 56, prepared by the Wage and Hour Division of the Department of Labor points out:

The modern daily newspaper is one of the important instruments for the transmission of intelligence, within and across state boundaries. It is one of the chief means by which the citizens of the country gain the knowledge of political events which helps them to participate in the affairs of the country, one of the chief means by which the Government informs the citizenry

⁵ In the course of the hearings on the wage and hour bills the then Assistant Attorney General expressed the view that he did not believe that "the fact that the newspaper got its news from an out of the State source would be sufficient to make the newspaper itself in interstate commerce." This was admittedly not a considered opinion and was carefully qualified by the statement that he had "never investigated the subject" and that "there might be other conditions" which might lead to a different opinion. Joint Hearings on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pt. 1, p. 81.

⁶ This report is in the record as defendant's ex. 15, omitted from the printed record pursuant to stipulation R. 88. It was prepared in order to supply factual information bearing on proposals to Congress to exempt from the Act daily newspapers with less than 3,000 or 5,000 circulation.

of the conduct of national affairs, an important means for the transmission of commercial and industrial intelligence necessary for the conduct of modern business enterprise. Specifically, the daily newspaper supplies news which must be transmitted speedily from source to reader; it supplies syndicated features for the reader's education and entertainment; it supplies trade, legal, weather, and crop reports which form the basis of business and legal transactions and of crop plantings; and it acts as a medium for the conveyance of messages from advertisers to readers, thereby inspiring and implementing the flow of trade and commerce. Its place in the national economy can very well be regarded as that of an essential agency of communication, at the same time that it is a productive enterprise similar to any other factory operation.

The fact that some of the activities of the newspaper, if considered separately, may be regarded as wholly local (see *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 261; *Blumensack Bros. v. Curtis Pub. Co.*, 252 U. S. 436, relied upon by respondent (see br. in opp., p. 16)), does not warrant the conclusion that other aspects of the business are not in interstate commerce. See *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533; see also *Polish Nat. Alliance v. National Labor Relations Board*, 322 U. S. 643. Moreover, a business which is held to be local and "separable from interstate commerce" for

State taxation purposes (see *Western Live Stock* case, *supra*, at 261), may nevertheless constitute interstate commerce regulable under the commerce clause of the Federal Constitution. *McGoldrick v. Berwind-White Mining Co.*, 309 U. S. 33. This Court has recognized that such tax decisions "are not particularly helpful in determining the scope of the [Fair Labor Standards] Act." *Overstreet v. North Shore Corp.*, 318 U. S. 125 at 132. See also *Walling v. Patton-Tulley Transp. Co.*, 134 F. 2d 945 (C. C. A. 6).

The case of *Blumenstock Bros.*, relied upon by respondent (br. in opp., p. 16), is inapplicable here for the same reasons it was held inapposite in *Indiana Farmers Guide Co. v. Prairie Co.*, 293 U. S. 268. Much more interstate activity is involved here than the mere making of advertising contracts. Respondent's newspaper, in addition to the constant receipt of news and intelligence via teletype, includes the obtaining of advertising, the constant transportation between States of mats and other materials to be used in setting up advertisements, and continuous interstate traffic in syndicated features, comic strips, pictorial matter and substantial quantities of other supplies. See *Farmer's Guide Co. v. Prairie Co.*, *supra*, at 276. See also *International Textbook Co. v. Pigg*, *supra*.

The reasoning of the Appellate Division that the news reports, intelligence, advertising and supplies came to rest and their interstate movement ended when they arrived at the newspaper's

place of business (R. 101-102), even if assumed to be sound with respect to the subsequent handling and publication of the news and other materials after they have been received,' at least cannot be sustained with respect to the function and

' It does not appear that the instant case requires a determination of the question how far, beyond the duties of receiving and assembling the news items immediately upon their arrival, the interstate commerce continues. It may be noted, however, that although clear judicial authority may be lacking, there is sound economic and practical support for the view that the newspaper itself is a channel or instrumentality for "communication among the several States" (see Sec. 3 (b)), in much the same way as the telephone, telegraph and press wire services are. See *Small Daily Newspaper Study*, *supra*, pp. 15, 18, 56, 57.

As the *Small Daily Newspaper Study*, p. 56. points out, newspaper enterprises are generally classified as "manufacturing" or "producing" establishments in the Census of Manufactures and directories of manufacturing industries, while economic or historical studies of the national economy usually group the newspaper industry with communication industries. See, for instance, Thompson and Jones, *Economic Development of the United States* (Macmillan, 1939), p. 55; Walter W. Jennings, *History of Economic Progress in the United States* (Crowell, New York, 1926), p. 511; Malcolm Willey and Stuart Rice, *Communications Agencies and Social Life* (Report of the President's Committee on Social Trends, McGraw-Hill, 1933), c. 14, pp. 156-176; the issues of *Public Opinion Quarterly*. For a description of the importance of the newspaper as an agency of communication, see Robert and Helen Lynd, *Middletown*, pp. 471. ff.

If the newspaper is regarded as itself a channel or instrumentality of interstate communication, the interstate commerce, we believe, may not be said to end immediately upon the receipt of the news (cf. *Schroepfer v. A. S. Abell Co.*, 138 F. 2d 111 (C. C. A. 4), certiorari denied, 321 U. S. 763), but would include also the publication and distribution of the news.

duty of receiving such goods as they arrive. See *Walling v. Jacksonville Paper Co.*, 128 F. 2d 395, 398 (C. C. A. 5), affirmed and modified, 317 U. S. 564; *Clyde v. Broderick*, 144 F. 2d 348 (C. C. A. 10); *Walling v. Goldblatt Bros.*, 128 F. 2d 778 (C. C. A. 7), certiorari denied, 318 U. S. 757; *Walling v. Mutual Wholesale Food and Supply Co.*, 46 F. Supp. 939, 947-948 (D. Minn.), affirmed, 141 F. 2d 33 (C. C. A. 8).

We submit that the Appellate Division and the Court of Appeals were in error in their approach to the question whether petitioners were engaged in commerce, and that the instant case may well be determined on the ground that petitioners are so engaged, without reference to the question whether the out-of-State circulation was *de minimis*. If the case is not determinable on this ground, there remains the question whether the court below properly applied the doctrine of *de minimis*.

2. A NEWSPAPER WITH ANY OUT-OF-STATE CIRCULATION IS ENGAGED IN PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING AND INTENT OF THE ACT, AND SUCH PRODUCTION IS NOT OUTSIDE THE SCOPE OF THE ACT AS *de minimis* WHERE IT IS A REGULAR AND RECURRENT CHARACTERISTIC OF THE NEWSPAPER'S CIRCULATION

Since concededly some of respondent's papers were produced for out-of-State circulation, there can be no question that respondent is engaged in the production of goods for commerce to some extent.

The only question is whether such production is outside the scope of the Act under the *de minimis* doctrine. The literal language of the Act as well as the legislative history support the conclusion that the Act encompasses the production of "any" goods for out-of-State shipment, and that such production, however small in volume, is not outside the scope of the Act as *de minimis*, at least in the case where it is a regular and recurrent part of the business. The fact that the volume of interstate shipment is small may have a bearing on the question whether a particular employee has adequately proved the relationship of his work to the interstate business,⁸ but the application of the Act to the work relating to such interstate business is not dependent upon its volume.

The literal language of the Act plainly supports this view. As this Court stated in *United States v. Darby*, 312 U. S. 100, 123, the Act makes "no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer."⁹ There is nothing in the language of the Act indicating that the volume of the production for commerce must be substantial or more than a certain amount in order for the Act to apply. On the contrary, Section 15 (a) (1) makes it a violation

⁸ See *supra*, pp. 4-5.

⁹ This has been the consistent view of the Administrator. See Interpretative Bulletin No. 5, par. 9, 1942 Wage Hour Man. 27-28.

to ship in commerce "*any* goods in the production of which *any* employee was employed in violation of" the minimum wage and overtime requirement of the Act [italics supplied]. *United States v. Rosenwasser*, 323 U.S. 360, 362-363.

The view that the Act is applicable to the production of "any goods" for commerce is further substantiated by the fact that the "substantial" standard which characterized some of the earlier drafts of the Act was completely omitted from the coverage provisions of the Act as enacted. In some of the earlier bills coverage was to be determined by a board or the Secretary of Labor on the basis of findings, *inter alia*, that employees were engaged in the production of goods "which are sold or shipped to a *substantial* extent"¹⁰ in interstate commerce" or that an industry was "dependent for its existence upon *substantial* purchases and sales of goods in commerce" or was related to commerce "in other respects close and *substantial*"¹¹ [italics supplied]. On the other hand, the Act as enacted, instead of delegating authority to any executive or administrative officer to determine the scope of coverage, specified the persons to whom the Act should apply—to

¹⁰ Contained in S. 2475, as passed by the Senate August 2, 1937; contained in H. R. 7200 as introduced in the House, May 24, 1937, and S. 2475, as reported in the House August 6, 1937.

¹¹ Contained in confidential committee print of April 13, 1938; contained in bill as passed by House on May 6, 1938.

"each" and "any" employee "engaged in commerce or in the production of goods for commerce" (Secs. 6 (a) and 7 (a)). The Act was not "conditioned * * * upon any particular volume or proportion of interstate" business of the employer. Cf. *Connecticut Light & Power Co. v. Federal Power Comm.*, 324 U. S. 515, 536.¹²

It may be argued that while Congress did not condition coverage upon the existence of a "substantial" amount or proportion of interstate business, nevertheless it does not follow that the doctrine of *de minimis* may not apply. In this connection, the definition of "substantial" contained in the bills which incorporated the substantial standard as a test of coverage, throws light on the scope of coverage contemplated by Congress and is indicative of the legislative view of what might be regarded as *de minimis* in the application of the Fair Labor Standards Act. "To a substantial extent" was defined to mean "not casually, sporadically or accidentally but as a settled or recurrent characteristic of the matter or occupation described or a portion thereof, which need not be a large or preponderant portion thereof"

¹² See also *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, where this Court held employees entitled to recover under the Act on the ground that "some of the oil produced ultimately found its way into interstate commerce" (317 U. S. at 91). "The Court did not say how much, nor whether the amount made any difference" (*Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875, 879 (S. D. N. Y.)).

(Black-Connery Bill, as introduced in the Senate, S. 2475, Sec. 2 (a) (26)).¹³

The view that Congress intended that the Act should apply to daily newspapers whose out-of-State circulation is small is substantiated by the explicit exemption provided in Section 13 (a) (8) for "any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published." Representative Creal of Kentucky, in proposing this exemption, asserted that (83 Cong. Rec. Pt. 7, p. 7445):

* * * under this bill, because 1 or 2 percent of a paper's circulation goes outside to people who want to get the home-town paper to see whether or not Lucy got married, or whether Sally's baby has been born yet, because that infinitesimal bit of their business is with people outside the county, these publications fall under the provisions of this bill * * *.

¹³ These provisions with some language changes in Sec. 9 (a) remained in the prints of the bill considered by the Senate Committee on Education and Labor. They were contained in the bill reported in the Senate July 18, 1937, and the bill passed by the Senate August 2, 1937. After S. 2475 was passed by the Senate it was substituted by the House Committee on Labor for H. R. 7200 and was reported to the House on August 6, 1937. The House Committee on Labor, upon reconvening after the House on December 17, 1937, voted to recommit S. 2475, again took up the consideration of S. 2475 and rewrote the bill, eliminating among other provisions, the sections and definitions referred to above.

It appears to have been assumed that, without the coverage exemption, a newspaper with any regular out-of-State circulation, however small, would be within the scope of the Act. It is significant that Congress has not seen fit to expand the exemption to include *daily* newspapers with a small out-of-State circulation, although similar reasons might be urged in support of such an exemption. The numerous attempts subsequent to the enactment of the Act to secure a similar exemption for daily newspapers with less than 3,000 or 5,000 total circulation have failed. See H. R. 7200, S. 2475, 75th Cong., 1st Sess.; H. R. 4900, H. R. 7340, 76th Cong., 1st Sess.; S. 3047, S. 4385, 76th Cong., 2d Sess.; H. R. 64, H. R. 4208, S. 284, S. 1310, 77th Cong., 1st Sess. (*Small Daily Newspaper Study*, pp. 67-68).

The legislative debates and hearings relating specifically to the application of the Act to newspapers, although inconclusive, lend further support to the view that the Act was intended to cover a daily newspaper with a very small out-of-State circulation. In the course of Congressional discussions with respect to the meaning of "commerce" as contemplated by the Act, several colloquies took place indicating that the sponsors of the Act considered such newspapers within the scope of the proposed legislation. During one such discussion, Senator Glass propounded the question whether he was engaged in commerce if he owned a newspaper with 20,000 subscribers,

which distributed its entire output in Virginia, except for 10 copies sent to extrastate subscribers. Senator Borah, who was called upon to answer because of his reputation as an expert on constitutional law, responded as follows (83 Cong. Rec., part 8, p. 9172):

Mr. President, if the Senator is purchasing his goods for the purpose of making up his newspaper in different States, and he takes them to a particular place where he uses them, and he transmits his newspapers into other States, I do not think the number—the number, 10 or 20 or 30—is controlling. I think the Senator is engaged in interstate commerce.

[Senator] Glass: "Well, I do not."

The same opinion was expressed by the then Assistant Attorney General in his testimony before the joint committees of Congress. Joint Hearings on S. 2475 and H. R. 7200, pt. 1, pp. 81-82.¹⁴

¹⁴ The bills then under discussion contained the "affecting commerce" language, but both Senator Borah and the Assistant Attorney General spoke in terms of engaging in commerce and production for commerce. In any event, regardless of which concept of "commerce" they had in mind, their remarks with respect to the significance of the amount or volume of interstate commerce in determining the application of the Act are nonetheless pertinent. In the application of the doctrine of *de minimis* there would seem to be no reason for differentiating between the language "affecting commerce" and the language "engaged in commerce or in the production of goods for commerce." See *Southern Calif. Freight Forwarders v. McKeown*, 148 F. 2d 890, 891 (C. C. A. 9).

The courts are virtually uniform in holding that an employee is within the protection of the Act if the interstate transactions to which his duties are necessary constitute a regular part of the business and are not casual, isolated or sporadic. See *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C. C. A. 10); *Davis v. Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4); *Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C. C. A. 8); *Suu Pub. Co. v. Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *McKeown v. Southern Calif. Freight Forwarders*, 52 F. Supp. 331 (S. D. Calif.), affirmed, 148 F. 2d 890 (C. C. A. 9), certiorari denied, October 8, 1945, this Term, No. 245; *Muldowney v. Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Strand v. Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.); *Fleming v. Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed, 120 F. 2d 213 (C. C. A. 1), affirmed, 315 U. S. 784.¹⁵ As was said in the *Engel* case, an employee's interstate activities are sufficiently substantial to bring him within the scope of the Act

¹⁵ For other lower court decisions to the same effect see *Ling v. Carrier Lumber Co.*, 50 F. Supp. 204 (E. D. Mich.); *Drake v. Hirsch*, 40 F. Supp. 290 (N. D. Ga.); *Elmore v. Cromer & Beaty Co.*, 6 Wage Hour Rept. 861 (W. D. S. C., 1943); *Cooper v. Gas Corp.*, 4 Wage Hour Rept. 550 (Cir. Ct. Mich., 1941); *Loeb v. Ideal Packing Co.*, 7 Wage Hour Rept. 397 (Cir. Ct. Wis., Mil. Co., 1944); and *Sykes v. Lochmann*, 6 Wage Hour Rept. 217 (Sup. Ct. Kan., 1943); *Keen v. Mid-Continent Petroleum Corp.*, 8 Wage Hour Rept. 1029, 1037-1038 (N. D. Iowa, 1945).

if such activities constitute "a part of the work-a-day duties of the employee," and his contribution to production for commerce is "both consistent and continuous," "not merely sporadic and isolated" (145 F. 2d at 640). The "character rather than the size of an activity is the controlling feature." *Davis v. Goodman Lumber Co., supra*, at 53. Where the interstate activities are "not casual nor spasmodic, but rather a continuous, regular and integral part of [the] everyday and every week business," the doctrine of *de minimis* has no application. See *McKeown v. Southern Calif. Freight Forwarders, supra*, at 333.¹⁶

¹⁶ The opinion of the Appellate Division characterizes respondent's out-of-State circulation as "not regular" but "casual and incidental" (R. 101). The opinion does not make clear whether it was assuming that such out-of-State circulation was a daily or weekly occurrence. It states that the out-of-State circulation was "not a regular part of appellant's [the newspaper's] business but only an inconsequential incident resulting from appellant's desire to serve the convenience of a few of its subscribers sojourning out of the State" (R. 100), and implies that it was solely for "subscribers temporarily out of the state" (R. 101).

It seems reasonably clear from the evidence in the record that the out-of-State circulation, though small, was a regular daily occurrence. The evidence consisted of references to the audit reports for three twelve-month periods, made by the Audit Bureau of Circulation, which showed an out-of-State circulation of 43, 46 and 40 subscriptions for the years ending March 31, 1939, and 1940 and 1941, respectively. (R. 58.) While there was testimony that "a certain number" of local residents would have the papers sent to them when they were on vacation out of the State (R. 56), and a few of the copies went to men in the service (R. 58), there was no

CONCLUSION

We submit, therefore, that the New York Court of Appeals erroneously concluded that respondent was not engaged in commerce or in the production of goods for commerce within the meaning of the Act.

Respectfully submitted.

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NOVEMBER 1945.

evidence that all or even most of the out-of-State circulation was of this character.

It seems a fair inference that the court below characterized the out-of-State circulation as irregular and casual, primarily if not solely, because of its small size and because the bulk of the circulation was local, and not because the out-of-State circulation was not a regular occurrence.

SUPREME COURT OF THE UNITED STATES.

No. 57.—OCTOBER TERM, 1945.

Courtney M. Mabey, Charles K.
Barnum, Edward G. Tompkins,
et al., Petitioners,
vs.
White Plains Publishing Com-
pany, Inc.

On Writ of Certiorari to
the Court of Appeals of
the State of New York.

[February 11, 1946.]

Mr. Justice DOUGLAS delivered the opinion of the Court:

Respondent publishes a daily newspaper at White Plains, New York. During the period relevant here, its daily circulation ranged from 9,000 to 11,000 copies. It had no desire for and made no effort to secure out-of-state circulation. Practically all of its circulation was local. But about one-half of 1 per cent was regularly out-of-state.¹ Petitioners are some of respondent's employees. They brought this suit in the New York courts to recover overtime compensation, liquidated damages and counsel fees pursuant to § 16(b) of the Fair Labor Standards Act of 1938. 52 Stat. 1069, 29 U. S. C. § 216(b). The Supreme Court gave judgment for the petitioners. 179 Misc. 832; 180 Misc. 8. The Appellate Division reversed and ordered the complaint to be dismissed. 267 App. Div. 284. That judgment was affirmed by the Court of Appeals without opinion. 293 N. Y. 781, 294 N. Y. 701. The case is here on a petition for a writ of certiorari which we granted because of the probable conflict between the decision below and those from the federal courts.²

The Appellate Division applied the maxim *de minimis* to exclude respondent from the provisions of the Act. We think that was error. The Court indicated in *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 607, that the operation of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. § 151) was not dependent on "any particular volume of commerce affected more

¹ About 45 copies daily. There appears to have been an out-of-state circulation of 43, 46, and 40 for the years ending March 31, 1939, 1940, and 1941 respectively.

² Cf. *Davis v. Goodman Lbr. Co.*, 133 F. 2d 52, 53; *Sun Publishing Co. v. Walling*, 140 F. 2d 445, 448; *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636, 640.

than that to which courts would apply the *maxim de minimis*." That Act,³ unlike the present one (*Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570-571), regulates labor disputes "affecting" commerce. 49 Stat. 450, 29 U. S. C. § 152. We need not stop to consider what different scope, if any the maximum *de minimis* might have in cases arising thereunder. Here Congress had made no distinction on the basis of volume of business. By § 15(a)(1) it has made unlawful the shipment in commerce of "any goods in the production of which any employee was employed in violation of" the overtime and minimum wage requirements of the Act. Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size. That has been the consistent position of the Administrator. Interpretative Bull. No. 5, par. 9 (1939), 1944-45 Wage Hour Man. 21. His rulings and interpretations "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U. S. 134, 140.

We stated in *United States v. Darby*, 312 U. S. 100, 123, "Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." And see *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88, 91. That view is borne out by the legislative history of the Act. Earlier drafts had embodied the "substantial" standard.⁴

³ Sec. 1 of that Act is a statement of the policy of Congress. It states that the denial by employers of the right of the employees to bargain collectively has the intent or effect of burdening or obstructing commerce by "materially affecting" the flow of goods from or into the channels of commerce or by "causing a diminution of employment and wages in such volume as substantially to impair or disrupt" the market for such goods.

⁴ See, for example, H. R. 7200, 75th Cong., 1st Sess., introduced May 24, 1937. It provided for a Labor Standards Board to administer the Act. The Board was to be given the power to establish minimum wages when it found, *inter alia*, that wages lower than a minimum fair wage were paid

These were omitted from the coverage provisions of the one which became the law. Moreover, one of the exemptions written into the Act extends to "any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published." § 13(a)(8). Representative Creal of Kentucky proposed this exemption. He stated that "under this bill, because 1 or 2 per cent of a paper's circulation goes outside to people who want to get the home-town paper to see whether or not Lucy got married, or whether Sally's baby has been born yet, because that infinitesimal bit of their business is with people outside the county, these publishers fall under the provisions of this bill, when on each side of this little printshop are the butcher and the baker, who are exempt and who are financially better fixed than he is." 83 Cong. Rec. p. 7445. No such exemption for daily newspapers was granted.⁵ No exemption on the basis of volume of out-of-state circulation was written into the Act. Rather the exemption of the small weeklies or semi-weeklies seems to have been adopted on the assumption that without it a newspaper with a regular out-of-state circulation, no matter how small, would be under the Act. The choice Congress made was not the exemption of newspapers with small out-of-state circulations but the exemption of certain types of small newspapers. We would change the nature of the exemption which Congress saw fit to grant, if we applied the *maxim de minimis* to this type of case. We would also disregard the plain language of § 15(a)(1) prohibiting the shipment in commerce of "any goods"

to employees "engaged in the production of goods which are sold or shipped to a substantial extent in interstate commerce." § 5(a).

The Confidential Committee Print of April 13, 1938, containing a proposed amendment to S. 2475, 75th Cong., 1st Sess., and embodied in the Committee Print of April 15, 1938, S. 2475, 75th Cong., 3d Sess., would have limited the applicability of the Act to employers "engaged in commerce in any industry affecting commerce. . . ." §§ 4, 5. It was further provided by § 6 of the draft that the Secretary of Labor should, after notice and hearing, determine the relation of the various industries to commerce. Only if the Secretary found that the industry was (a) "dependent for its existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce", or (b) "Nation-wide in . . . scope", or (c) related to commerce "in other respects close and substantial", could the Secretary issue an order declaring the industry to be one affecting commerce and thus within the purview of the Act.

⁵ A number of bills have been introduced since the passage of the Act to secure a similar exemption for daily newspapers but none of them has passed. See H. R. 7340, 76th Cong., 1st Sess.; S. 4385, 76th Cong., 3d Sess.; H. R. 64, H. R. 4208, S. 1310, S. 284, 77th Cong., 1st Sess.

in the production of which "any employee" was employed in violation of the overtime and minimum wage requirements of the Act.

Respondent argues that to bring it under the Act, while the small weeklies or semi-weeklies are exempt by reason of § 13(a)(8), is to sanction a discrimination against the daily papers in violation of the principles announced in *Grosjean v. American Press Co.*, 297 U. S. 233. Volume of circulation, frequency of issue, and area of distribution are said to be an improper basis of classification. Moreover, it is said that the Act lays a direct burden on the press in violation of the First Amendment. The *Grosjean* case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects it has no special immunity from laws applicable to business in general. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 132-133. And the exemption of small weeklies and semi-weeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers. *Grosjean v. American Press Co.*, *supra*, p. 250. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. 83 Cong. Rec. 7445. The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field. *Steward Machine Co. v. Davis*, 301 U. S. 548; *Currin v. Wallace*, 306 U. S. 1, 13-14.

We hold that respondent is engaged in the production of goods for commerce. That, of course, does not mean that these petitioners, its employees, are covered by the Act. The applicability of the Act to them is dependent on the character of their work. *Kirschbaum Co. v. Walling*, 346 U. S. 517, 524; *Walling v. Jacksonville Paper Co.*, *supra*, pp. 571-572. We express no opinion on that phase of the case, as the New York appellate courts did not pass on it. Since the judgment below must be reversed, the question whether the Act is applicable to these employees will be open on the remand of the cause.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 57.—OCTOBER TERM, 1945.

Courtney M. Mabee, Charles K.
Barnum, Edward G. Tompkins,
et al., Petitioners,
vs.
White Plains Publishing Com-
pany, Inc.

On Writ of Certiorari to
the Court of Appeals of
the State of New York.

[February 11, 1946.]

Mr. Justice MURPHY, dissenting.

I agree that to print approximately 10,000 newspapers a day and regularly to send 45 of them, or $\frac{1}{2}$ of 1%, out of the state is to produce goods for interstate commerce. But I cannot agree that Congress meant to include a business of that nature within the ambit of the Fair Labor Standards Act of 1938.

This Court, in *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 606, stated that "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express prohibition or fair implication." Concededly, Congress has not excluded commerce of small volume from the coverage of the Fair Labor Standards Act by "express prohibition." But certainly the "fair implication" is one of exclusion. On numerous occasions we have pointed out that Congress in this Act did not exercise the full scope of its commerce power, *Kirschbaum Co. v. Walling*, 316 U. S. 517, 522-523, and that Congress plainly indicated its purpose to leave local business to the protection of the states so far as wage and hour problems were concerned, *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570; *Phillips Co. v. Walling*, 324 U. S. 490, 497.

In my opinion, a company that produces 99 $\frac{1}{2}$ % of its products for local commerce is essentially and realistically a local business. True, $\frac{1}{2}$ of 1% of its production is for interstate commerce, thus subjecting it to the constitutional power of Congress when and if exercised. But that fact does not make it any less a local business, which we have said Congress plainly excluded from this Act.

I would therefore affirm the judgment below in this respect.